PROCEEDINGS

IN THE

COURT OF KING'S BENCH IN IRELAND,

ON

AN ISSUE

Joined between

THE RIGHT HON. JOHN TOLER,

ATTORNEY-GENERAL,

ON THE PART OF THE KING,

AND

JAMES NAPPER TANDY AND HARVEY MORRIS, ESQRS.

WITH

THE EVIDENCE,

ARGUMENTS OF COUNSEL,

AND

CHARGE OF THE RIGHT HON. *LORD KILWARDEN.*

(Taken in Short Hand.)

DUBLIN:

PRINTED BY JOHN STOCKDALE, NO. 62, ABBEY-STREET.

1800.

JUN 6 1911

TRIAL, &c.

KING'S BENCH.

MONDAY, TENTH OF FEBRUARY, 1800.

THIS day, *James Napper Tandy*, and *Harvey Morris*, Eſqrs; were brought to the bar of the court, from the gaol of Kilmainham, in the county of Dublin.

Mr. Attorney-General informed the court, that a certiorari having iſſued from the court of Chancery to the clerk of Parliament, to remove the tenor of a certain act of Parliament, entitled an Act to attaint ſeveral Perſons therein named, among whom were *James N. Tandy*, and *Harvey Morris*, Eſqrs; and the ſame having been returned into Chancery, a writ of mittimus had iſſued, by which the record of the ſaid act of Parliament was now before their lordſhips.

According to the direction of that act, the priſoner, *James Napper Tandy*, had been arreſted and committed to the gaol of Kilmainham, in the county of Dublin, by a warrant charging him to be one of the perſons who by the act were attainted for having been concerned in the late rebellion, and not having ſurrendered, and thereby made himſelf amenable to juſtice, before the firſt day of December, 1798, as the act required.

Mr. Harvey Morris, the other priſoner, had been committed to the ſame gaol, under ſimilar circumſtances. The priſoners were now brought up to court, by *habeas corpus*. Two months had elapſed ſince the warrant of committal had been executed; and notice of it having been given to him as *Attorney-general*, there now remained but one duty for him to perform, which was, that when the record and other

proceedings certified to the Court ſhould be read, to tender the uſual ſuggeſtion in ſuch caſes: the priſoners would then have an opportunity to avail themſelves of that right which the law gave them, to offer ſuch reaſon as they might have to ſhew cauſe why execution ſhould not be awarded againſt them; in doing which he hoped they would be well adviſed by their counſel and by the Court, who in ſuch caſes was bound to be their counſel, before he ſhould be put to the diſtreſſing neceſſity of making the laſt application to the Court.

Mr. Attorney-General then moved that the certiorari and the return thereon; and the habeas corpus and the return thereon, might be read.

Lord Kilwarden, C. J. Are the priſoners in court, jailor?

Jailor. They are, my lord.

Here the priſoners got up, and bowed reſpectfully to the Court.

Mr. Attorney-General then ſaid that, the regular mode of proceeding would be; firſt to have the tenor of the act of attainder read in court; which being done, he would pray that execution ſhould be awarded againſt the priſoners.

Lord Kilwarden—ſaid, the regular mode of proceeding was, that the clerk of the crown ſhould firſt call on the priſoners to hold up their hands, in order to identify them; and then to read the record diſtinctly to them.

Clerk of the Crown. James Napper Tandy and *Harvey Morris*, hold up your hands?

The priſoners held up their hands.

Clerk of the Crown: then read the record which contained the writ of mittimus directed to the chief juſtice and his aſſociates; the tenor of the writ of certiorari, directed to the clerk of the parliament; the return thereto; and the title of the act of attainder, in which were the names of the two priſoners.

Lord Kilwarden. Priſoners, is it your deſire to have counſel aſſigned?

Mr. Tandy. I thank your lordſhip for reminding me of that: it is my wiſh to have counſel aſſigned.

Lord Kilwarden. You may name any number of counſel you have a mind: in caſes of this kind there is no reſtriction; it ſo appears in *Johnſon*'s caſe in *Foſter's Reports.*

Mr.

Mr. Tandy. Then, my lord, I pray that Mr. George Ponſonby, Mr. Curran, Mr. M'Nally, and Mr. Ridgeway, may be aſſigned to me.

Clerk of the Crown. Harvey Morris, do you deſire counſel to be aſſigned?

Mr. Morris. I pray that Mr. Ponſonby, Mr. Curran, Mr. Mac Nally, and Mr. Buſhe, may be aſſigned.

Lord Kilwarden. Do the priſoners wiſh to have agents aſſigned to them?

Mr. Mac Nally, My lord, Mr. Tandy deſires that Mr. Alexander Cooke, attorney, may be aſſigned as his agent. Mr. Morris prays that Mr. Alſop, attorney, may be aſſigned for him.

Clerk of the Crown. James Napper Tandy, hold up your right hand: What have you to ſay why execution ſhould not be awarded and done upon you?

Mr. Curran—prayed for the allowance of a reaſonable time in order that the agents might receive inſtructions from the priſoners relative to their caſe. He urged the novelty of proceedings by bill of attainder in this country; it might be neceſſary for the counſel for the priſoners to look into precedents, and to conſider of the priſoner's defence.

Mr. Attorney-General—admitted the uſage in ſuch caſes to allow the priſoner's counſel a reaſonable time to be prepared for their defence. Of the reaſonableneſs of that time, in Radcliffe's caſe, the priſoner, he obſerved, was brought to the bar on Friday, the 21ſt of November, 1746, and the Court gave until the Monday following. The charge in the preſent caſe was of a long date, and all the particulars were ſpecified in the warrant of committal: he therefore moved that the priſoners be brought up on Wedneſday next.

Lord Kilwarden. You agree, Mr. Attorney, that the priſoners ſhould have time neceſſary to prepare for their defence; and you mention Wedneſday as the day for trial. Do you recollect Wedneſday will be the laſt day of term? Conſider in what ſituation you will be, if the arguments on the caſe, and they may be very long, ſhould be protracted until Thurſday morning.

Mr. Attorney-General—ſaid, that if, on Wedneſday, the priſoners ſhould lay any ſubſtantial reaſons before the Court, to poſtpone their trial; the Court would then decide as their

diſcretion ſhould direct: for himſelf, he could ſee no good reaſon why they ſhould not be brought up to-morrow.

Lord Kilwarden. You have already agreed, Mr. Attorney, to give them till Wedneſday; and ſurely you would not ſhorten that time?

Mr. Ponſonby—urged, that under ſuch circumſtances, four days was a uſual and reaſonable time to grant.

Mr. Mac Nally ſuggeſted, that the priſoners might probably be adviſed to ſever in their pleas; or under the different circumſtances of their caſes, to put in pleas varying from each other: if ſo, there muſt be ſeparate trials on the ſeparate iſſues, which could not be decided by the Court within the term. In Ratcliffe's caſe, which had been cited by Mr. Attorney-General, the learned gentleman would obſerve, upon looking into it, that the time granted to the priſoner was the ſame with that now prayed for on the part of Mr. Tandy and Mr Morris; and in that caſe too, the plea which the priſoner put in, and could only put in, was, the moſt ſimple poſſible; it was merely, that he was not the perſon mentioned in the record before the Court.

Mr. Curran—ſaid, a variety of facts were involved in the caſes of the priſoners, and probably the law on thoſe caſes might create ſome difficulty; he obſerved there were but two evenings for the counſel for the priſoners to conſult on the nature of the defences.

Mr. Attorney-General. If on Wedneſday next, when the priſoners would be brought up, any facts ſpecified by affidavit ſhould be laid before the Court, that would juſtify a further poſtponement of their trials; the priſoners would have the full benefit of ſuch an application: but it would be a dereliction of the duty he owed to the country, ſtanding in the ſituation he did, if he did not on that day pray execution againſt them, which the Court were bound to grant. If further poſtponement ſhould be prayed, he hoped, at leaſt, that the nature of the priſoner's defence ſhould be communicated on oath, in order that the counſel for the crown alſo ſhould have time for conſidering it.

Lord Kilwarden. Let the priſoners be remanded until Wedneſday morning, at the ſitting of the Court; and let their counſel and agent have ſeaſonable and free acceſs to them.

The priſoners were accordingly remanded.

WEDNESDAY,

WEDNESDAY, FEBRUARY 12.

The priſoners were this day brought to the bar of the Court.

Mr. Attorney-General prayed that execution ſhould be awarded againſt the priſoners.

Clerk of the Crown. Jailor, make a bar: put James Napper Tandy and Harvey Morris forward. Priſoners, what have you to ſay why execution ſhould not be awarded and done upon you?

Mr. Curran ſtated, that the time allowed the priſoners to prepare for their defence had been ſo ſhort, that counſel had not been able to make up their minds as to the moſt proper mode they ought to purſue on this occaſion: and he therefore prayed that the priſoners might be allowed until the firſt day of the next term.

Lord Kilwarden. Is this ſuggeſtion of counſel the only ground to be laid before the Court for the poſtponing of this trial until the firſt of next term?

Mr. Curran—ſaid it was the only reaſon he could offer to the Court.

Mr. Attorney-General ſaid, that the Court could uot take notice of ſuch a motion, ſo grounded. This was a parliamentary attainder, which took place ſo long ſince as the year 1798: the parties had been three months in cuſtody: the warrant of committal ſpecified the offence. In order to ground ſuch an application, facts ought to be laid before the Court, verified by affidavit.

Mr. Ponſonby. This application was to the diſcretion of the Court. He knew not what document or affidavit of the reaſons urged, could be laid before the Court, much leſs how theſe reaſons could be made appear on record. The application was grounded on this—that from the ſhortneſs of the time allowed to the priſoners, their counſel had not been able to ſatisfy themſelves as to the propriety of a mode of defence. Whatever time might have elapſed ſince the priſoners were committed, was immaterial: they had never been furniſhed with a copy of their committal, until Saturday night laſt: this fact could be proved, and would be, if it were neceſſary. Another ground of the application was, that only one day had intervened ſince the priſoners were

firſt

firſt brought to the bar of the Court: this fact was in the knowledge of the bench and of the counſel for the crown, whoſe humanity, he truſted, would not preſs the priſoners, unprepared as they were to ſtand their trial; when the delay required, and material for their defence, could not by poſſibility give them an opportunity of eluding juſtice.

Mr. Prime Serjeant ſaid, he had never before heard the doubts of counſel for a priſoner, whether they would be able to make any defence, or agree on the nature of it, urged as reaſons to delay public juſtice. On the firſt day the priſoners were brought up to court, their counſel applied for time, and the Court gave them until Wedneſday; which they determined to be ſufficient time.—

Lord Kilwarden. We gave no opinion about it.

Mr. Prime Serjeant. The counſel for the priſoners cannot but have determined, at leaſt, on the nature of the defence they intend to make.

Mr. Curran. The priſoners counſel have determined as to the nature of the defence, but not as to the exact ſhape in which to urge it.

Mr. Mac Nally ſaid, that the time to be allowed the priſoners was not to be dictated from the counſel on either ſide; it was matter of diſcretion in the Court, and that diſcretion would be exerciſed with liberality. The Court would determine on what time the plea in bar ſhould be put in; and from analogy he would ſhew upon principle, that they were entitled to four days. Suppoſe the priſoners now ſtood convicted, at the bar of the Court, for treaſon or felony, they would be entitled, by the rules of the Court, to four days, to move an arreſt of judgment; and if the four days, ſo allowed, could not be included within the term, they would have the benefit of the whole of the enſuing vacation. Now here they ſtood convicted, unleſs they could ſhew cauſe by their plea: therefore, as in caſe of arreſt of judgment, they have a right to four days to conſider the record, and producing ſuch plea as would bar the attaint.

Mr. Attorney-General. The preſent caſe was not analogous to caſes where there was judgment againſt the priſoners; for here the judgment is of a kind that could not be arreſted. It was ſaid by the counſel who ſpoke laſt, that there was to be a plea in bar; and if ſo, the facts on which that plea was to be grounded ſhould now be diſcloſed.

Mr.

Mr. Mac Nally. This is the first time, and probably it will be the last, that counsel for the crown ever called on the counsel for the prisoner, to disclose the secrets of his case.

Mr. Attorney-General. You come for favour, and it is not fair, either in respect to the Court, or the counsel for the crown, to keep them hoodwinked. He observed that *Ratcliffe*'s case was much more deserving indulgence, from the length of time that *Ratcliffe* had been out of the country. In that case, and in *Johnson*'s case, there was a simple outlawry, or a commission under a statute; here this is an attainder by act of parliament: he insisted, therefore, on the prisoners stating the nature of their defence, though he did not mean to bind them down by form.

Lord Kilwarden. We see no ground to warrant the Court in a further postponement; we have no affidavit laid before us, to direct our discretion: all that has been urged, though urged with ability, is still the mere statement of counsel.

Mr. Curran then said, that agreeably to the request of the *Attorney-General*, he would state to the Court the nature of the defence, on which the prisoners counsel would rely. Their defence would be this—the statute on which the proceeding was founded, enacts, that the persons therein named, having fled from justice, should stand attainted, unless by surrendering before the first of December, 1798, they became amenable to the laws of their country: till that day, the statute gave them time to surrender; and until the expiration of that day, they could not be attainted for default. Now the fact on which the prisoners counsel rely is—that before the first of December, 1798, and for many days before it, the prisoners were arrested at Hamburgh, by command of his Majesty; so that by the command of the King himself, they were physically prevented from surrendering;—such was the substance of their defence. As to the manner in which it should be urged, whether the naked fact should be stated, or the result of that fact; or that this arrest by the King was virtually a surrender, was as yet a doubt with the prisoners counsel, to settle which, they prayed the Court for an indulgence of time. Having thus complied with all the *Attorney-General* had suggested, he hoped for his concurrence in applying to the Court for time, until the next term, in order to prepare the plea.

Mr.

Mr. Attorney-General ſuggeſted, that the converſation of counſel could not appear of record, and would not account to poſterity for the poſtponement of juſtice. Many caſualties might occur: the judges might die before next term; or their books might be loſt; and, therefore, he could not conſent to have the matter left in this way. As to the plea, it was the ſimpleſt thing in the world, and one which the youngeſt man at the bar could prepare in a moment. Counſel, therefore, he was perſuaded, muſt have come prepared with their plea in parchment; and nothing but a ſubſtantial plea could be a bar to his prayer for execution.

Mr. Ponſonby. If the Court inſiſt upon it, we are ready to tender a plea in bar inſtanter.

Lord Kilwarden. If you plead *ore tenus*, we ſhall obſerve great ſtrictneſs.

Mr. Ponſonby. It has been deſired by the *Attorney-General*, that the plea ſhould be put in on parchment; but I will undertake, if Mr. *Attorney* diſpenſes with a formal plea at preſent, that the counſel for the priſoners will not depart from the ſubſtance of whatever plea they may now mention.

Mr. Attorney-General. The practice is both ways: that of pleading *ore tenus*; and that of putting in a written plea. The priſoners may plead *ore tenus*, but they muſt now plead one way or other.

Lord Kilwarden. If you inſiſt on their pleading they muſt plead now.

Clerk of the Crown again aſked Mr. *Tandy*, what he had to ſay why execution ſhould not be awarded?

Mr. Mac Nally read the priſoners' plea. "I ſay, that before the time of ſurrender, namely, the firſt day of December, 1798, to wit, on the 24th day of November, in the year 1798, I was in parts beyond the ſeas, to wit, at Hamburgh, where I was arreſted and confined by command of his majeſty our lord the King; and ever ſince continually have been detained in priſon by the ſame command; by reaſon of which arreſt and continual detainer, I have been prevented from ſurrendering myſelf; and this I am ready to verify."—

Mr. Curran hoped, in ſupporting this plea, the priſoners' counſel would not be held to proof of the ſpecific place and day of the arreſt, provided they proved the arreſt to have been

been before the day which the ſtatute appointed for the ſurrender.

To this the Court aſſented.

Mr. Ponſonby—ſaid, he hoped it would not be neceſſary to prove the perſonal command of the King.

Lord Kilwarden. On this point we will give no opinion.

The plea was then amended by the priſoners counſel (the words "deſire and authority" being inſerted after the word "command").

Mr. Attorney General—then put a replication *inſtanter*, and *ore tenus*, as follows: "I ſay that the priſoner, *James Napper Tandy*, in the plea mentioned, was not prevented in manner and form as he has ſtated, from ſurrendering himſelf within the time preſcribed by act of parliament; to wit, before the firſt day of December, 1798, in manner and form as is by ſaid plea alledged; and this I pray may be enquired of by the country."

Here the priſoners counſel urged, that the replication tendered an iſſue not of fact, but an inference of law: and the counſel for the crown refuſing to alter the replication, the priſoners counſel prayed an hour to conſider of joining iſſue: which being granted by the Court, they retired, and on returning preferred an amended plea. *(As the plea is grounded on the ſtatute we here inſert the penal clauſe.)*.

"Whereas the following perſons have been notoriouſly "engaged in the ſaid rebellion, either by taking up arms "or levying war againſt his Majeſty, or by having correſ-"ponded with, or adhered with, his enemies; or by other-"wiſe fomenting or promoting the ſame, or acting therein, "and being conſcious of their guilt have fled from juſtice; "that is to ſay (here follow ſeveral names), *James Napper "Tandy* and *Harvey Morris*. Be it therefore enacted, that "the ſaid ſeveral perſons, and each of them, ſhall ſtand at-"tainted of high-treaſon, and ſhall be liable to all the "pains and penalties of law annexed to the crime of high-"treaſon, unleſs they, and each of them, ſhall ſeverally, "and reſpectively, ſurrender themſelves to one of the judges "of his Majeſty's court of King's-bench; or to ſome juſ-"tice of the peace within this kingdom, before the firſt day "of December, 1798, and ſhall reſpectively abide ſuch "charges as ſhall be made againſt them reſpectively, for,

" and on account of, the ſeveral treaſons aforeſaid, with " which they have been charged."—

COPY OF THE PLEA.

" And the ſaid *James Napper Tandy* ſays, that before the " firſt day of December, 1798; to wit, on the 24th day " November, 1798, in parts beyond the ſea, to wit, at " Hamburgh, he was arreſted and impriſoned, by the com- " mand, deſire, and authority, of his majeſty our ſaid lord " the King; and has been ever ſince continually detained " in priſon, by the ſame command, deſire, or authority: " by reaſon of which arreſt and continually detention, it " became impoſſible for him, the ſaid *James Napper Tandy*, " from the time of ſaid arreſt, to ſurrender himſelf on or " before the firſt day of December, 1798; and continued " ſo impoſſible until after the ſaid firſt day of December, " 1798, and this he is ready to verify, and ſoforth."—

COPY REPLICATION.

" And the ſaid right hon. *John Toler*, attorney-general of " our ſaid ſovereign lord the King, who for our preſent ſaid " ſovereign lord the King in this behalf proſecuteth, as to " the ſaid plea of him the ſaid *James Napper Tandy*, by " him above pleaded as aforeſaid, for our ſaid preſent " ſovereign lord the King, ſaith, that the ſaid *James Napper* " *Tandy* did not ſurrender himſelf within the time in the " ſaid act of parliament mentioned, to wit, on or before the " firſt day of December, 1798, without ſuch cauſe as in " the plea of the ſaid *James Napper Tandy* is by him al- " ledged; and this he prays may be enquired by the coun- " try; and the ſaid *James Napper Tandy* likewiſe, and ſo- " forth."

The following AFFIDAVIT *was then made by the Priſoners.*

THE KING,
v.
JAMES NAPPER TANDY
AND
HARVEY MORRIS.

James Napper Tandy and *Harvey Morris*, ſeverally make oath, and ſay, that on or about the 24th day of November, 1798, theſe deponents were reſpectively arreſted at the town of *Hamburgh*, by —— *Myers*, and —— *Wallboum* (whoſe chriſtian names theſe

theſe deponents know not), bailiffs or conſtables of the ſaid city of *Hamburgh*; acting, as theſe deponents verily believe, under the orders of his majeſty king George the third, king of Great-Britain, France, and Ireland. And theſe deponents ſeverally ſay, that the ſaid —— *Myers*, and —— *Wallboum*, are now, as they believe, in the city of *Hamburgh*, and are material witneſſes to be examined on behalf of theſe deponents; without the benefit of whoſe teſtimony theſe deponents are adviſed and believe, they cannot abide the trial of the iſſue in this caſe. And theſe deponents ſay, that *Sir James Crawford, Bart.* who was his Majeſty's reſident miniſter at *Hamburgh*, at the time of the ſaid arreſt, and under whoſe authority, and by whoſe orders, the ſaid arreſt was made, as theſe deponents verily believe; in as much as they were arreſted by the ſaid *Myers* and *Wallboum*, in the name of his Britannic Majeſty, is alſo a material witneſs; without whoſe teſtimony theſe deponents cannot ſafely abide the trial of the iſſue in this cauſe. And theſe deponents ſay, that they will uſe their beſt endeavours to procure the attendance of the ſaid witneſſes at the next Eaſter term; and expect that they will procure the attendance of the ſaid perſons, at the time aforeſaid. And theſe deponents further ſay, that they do not mean or intend to give any unneceſſary delay on the trying the iſſues in this caſe.

Sworn in Court, this 12th day of February, 1800.

James Napper Tandy.
Harvey Morris.

Upon this affidavit being filed—

Mr. Mac Nally—moved, that it might be read: which being done; he then moved, that the trial of the priſoners might be poſtponed until the following term.

This application met with no oppoſition by the counſel for the proſecution.

The priſoners were accordingly remanded until Monday the 3d of May.

In the interim the following affidavit was made; in conſequence of which the trial was, by conſent of Mr. *Attorney-General*, poſtponed, when the priſoners were brought up on the *third* of May, from time to time, until Friday the 16th of the ſame month.

THE KING,
v.
J. N. TANDY
AND
H. MORRIS.

James Tandy, of the city of Dublin, merchant, maketh oath, that on the 10th day of March laſt, he wrote a letter to Sir *James Crawford*, a copy of which is hereunto annexed, marked No. I. requeſting his attendance to give evidence in this honorable Court, upon the trial of the iſſue in this cauſe. And ſaith, that in order to enſure a ſpeedy and ſafe conveyance of ſaid letter, deponent ſhewed the contents thereof to a gentleman, who holds a confidential ſituation in the Secretary's Office, at Dublin-Caſtle; and deponent at ſame time gave him ſaid letter, to be forwarded to ſaid Sir James Crawford, as directed; which deponent believes was accordingly done. But ſaid Sir James Crawford having left Hamburgh for London, the ſaid letter did not reach his hands until the 11th of April laſt, as appears by his anſwer, dated London, the 11th of April, 1800, in which he expreſſes his readineſs to attend in this cauſe; but apprehends he cannot be in this kingdom until the latter end of the preſent Eaſter term, as by ſaid letter hereunto annexed, marked No. II. may more fully appear. And deponent ſaith, that he wrote another letter to ſaid Sir James Crawford, acquainting him that his attendance in this Court was indiſpenſible, and requeſting him to come over as ſoon as he poſſibly could—which letter deponent forwarded by the poſt for London. And deponent further ſaith, that in a ſhort time after laſt term, deponent employed a gentleman of the name of George Smith, to go to Hamburgh, for the purpoſe of procuring the attendance of ſaid Sir James Crawford, and —— Myers, and —— Wallboum, named in the affidavit of J. N. Tandy, ſworn laſt term; and for that purpoſe to ſerve them with crown ſummonſes, ſigned by the proper officer of this honourable Court; and that ſaid George Smith accordingly proceeded from hence for Hamburgh. And ſaith, that before ſaid George Smith had left this kingdom, deponent wrote to ſaid —— Myers, and —— Wallboum, to apprize them of the neceſſity of their coming to this kingdom, for the purpoſe of giving evidence in this cauſe. And ſaith, he received a letter ſigned —— Myers, which is in he German language. And deponent believes, that neither Sir James Crawford, nor —— Myers, or —— Wallboum, nor ſaid George Smith, are yet arrived in this kingdom; ſo that they cannot be produced at preſent

to

to give evidence in this cauſe. But deponent is in hourly expectation of the arrival of ſaid George Smith, and expects the other witneſſes, and particularly ſaid Sir James Crawford, will arrive here in the middle or latter end of the term; and ſaith he has uſed every diligence in his power to procure their attendance. And ſaith he does not make this affidavit for the mere purpoſe of unneceſſary delay, but in hopes of an opportunity being given for the attendance of the witneſſes before named.

No. I.

COPY OF A LETTER TO *SIR JAMES CRAWFORD.*

SIR, Dublin, March 10, 1800.

The ſubject of this letter muſt be my apology for the trouble it gives you. I beg permiſſion to acquaint you, that in conſequence of the proceedings taken in this kingdom, againſt my father, James Napper Tandy, and alſo againſt Mr. Harvey Morris, whom you cauſed to be arreſted in Hamburgh, in the month of November, 1798: the court of King's-bench in this kingdom, has appointed a trial to be had in the beginning of next Eaſter term.—Upon this trial, my father has been adviſed, and has ſo ſworn, that you will be a material witneſs.—I am therefore to requeſt and intreat your attendance in Dublin, on the 28th day of April next; and that you will immediately apprize me of your arrival, in order that ſuch an arrangement may be made, that as little delay as poſſible may occur.

If your travelling expences be an object to a perſon of your rank and ſituation, they ſhall be paid to you.

Permit me alſo to requeſt your immediate anſwer, whether it will be in your power to attend in Dublin, at the time appointed.

I have the honor to be,

SIR,

Your obedient humble Servant,

JAMES TANDY.

COPY

No. II.

COPY OF SIR JAMES CRAWFORD'S LETTER TO JAMES TANDY.

SIR, London, 11th April, 1800.

I *yesterday* received your letter of the 10th of March. This delay must have arisen, as I conceive, from its having been by mistake sent to Hamburgh; but as it came to me along with many others, I did not observe by what post it was brought. Nothing else should have prevented my answering it by the return of the post.

If I can, by any act of mine, consistently with my duty to his Majesty, be of any use to a man in your father's situation; or if he or his family fancy that I can, their request shall be attended to; and in such a case, neither the expence, were it much heavier, nor the trouble, would be any consideration with me. I have, however, some business on my hands here, which may, perhaps, prevent my arrival in Dublin so early as the 28th instant. It indeed may so happen that I cannot, without prejudice to my own affairs, reach that city 'til the middle, or perhaps a little past the middle, of the Easter Term: pray therefore inform me, whether, in this case, the trial cannot be deferred. At all events, be assured of my readiness to comply with your wishes; and that any act by which I can administer any consolation to yourself, your father, or his family, will give me a degree of pleasure, equalled only by the pain which the discharge of those duties has sometimes occasioned to me.

I am, Sir,
Your most obedient humble servant,

JAMES CRAWFORD.

FRIDAY, MAY 16.

This day Messrs. James Napper Tandy, and Harvey Morris, were brought up to the Court of King's Bench, pursuant to a rule for that purpose made last Monday.

Mr. Attorney-General said, that this trial had been postponed from time to time, in order to give the prisoners an opportunity

opportunity of procuring the attendance of material witneſſes from England: he underſtood that theſe perſons had arrived.

Lord Kilwarden.—Are the priſoners in Court?

Mr. Ponſonby, for the priſoners.—The principal witneſs, on whoſe account this trial was poſtponed, has arrived late laſt night, and it is but within theſe few minutes that the priſoners counſel have been informed of the fact. We do not know if there has yet been any communication with the witneſſes: we do hope it would be the ſame thing to Mr. Attorney General; we would wiſh to let the trial ſtand over until to-morrow.

Mr. Attorney General.—It would be contrary to the rule to let the trial be poſtponed in this manner. I truſt the gentlemen will lay ſomething before the Court. It has been the diſpoſition, on the part of the Crown, to accommodate the priſoners: they ſtated the evidence they were anxious to procure, and I underſtand that evidence has arrived.

Lord Kilwarden.—Is Sir James Crawford in Court? The counſel for the priſoners wiſh to poſtpone the trial: on what ground is that wiſh formed?

Mr. Ponſonby.—Not, my Lord, upon an affidavit, but on a fact that is in the knowledge of the Crown; that Sir James Crawford did not arrive until late laſt night, and we would wiſh to have until to-morrow to confer with the other gentlemen concerned for the priſoners. Certainly the priſoners have received every accommodation.

Attorney General.—It is not within the uſual mode of proceeding to make ſuch an application as the preſent without an affidavit; but, my Lords, theſe are facts that are of notoriety; I know that Sir James Crawford did arrive late laſt night.

Lord Kilwarden.—Do you, Mr. Attorney, conſent to the motion, or do you leave it to the Court?

Attorney General.—Not, my Lord, for to-morrow, but for Monday.

Lord Kilwardin.—Then you conſent to the motion, Mr. Attorney?

Attorney General.—I cannot retract; I think I am bound from what has occured: to be ſure, I think, there ought to be an affidavit laid before the Court to juſtify the proceeding.

Lord Kilwarden.—Do you conſent?

Attorney General.—I do, my Lord, for Monday.

Lord

Lord Kilwarden. Mr. Ponſonby, do you move for Monday?

Mr. Ponſonby. I do, my Lord.

Lord Kilwarden. Do you, Mr. Ponſonby, make the motion on the part of both the priſoners?

Mr. Ponſonby. I do, my Lord, move on behalf of both the priſoners.

Lord Kilwarden. Let the priſoners be remanded until Monday, and then brought up by habeas corpus. The Court, Mr. Attorney General, and Mr. Ponſonby, will ſit at ten o'clock on Monday morning.—The priſoners were remanded.

MONDAY, MAY 19.

The priſoners were brought to the bar of the Court by habeas corpus, in purſuant of the rule for that purpoſe made on Saturday.

Clerk of the Crown. Gaoler: ſet James Napper Tandy, and Harvey Morris, forward.

The priſoners ſtood up.

Lord Kilwarden. The priſoners, Mr. Attorney-General, are at the bar; what do you do?

Mr. Attorney-General. It is for me to call on the counſel for the priſoners, who have put in the plea, to proceed firſt; and, in order to have it laid before a jury, it is my duty to pray that a venire do iſſue, returnable inſtanter, that a jury may be impannelled to try the iſſues in theſe pleadings.

Lord Kilwarden. Let the ſheriff return a jury.

Clerk of the Crown. Do you pray a *venire* in both caſes?

Mr. Attorney-General. Yes: they have joined in their pleas. It was in order to ſave the time of the Court, that I prayed for a *venire* againſt both: but it will be more regular to proceed with reſpect to James Napper Tandy firſt: the pleas are ſeparate; unleſs they conſent to have them tried together.—

Mr. Ridgeway, It is not our duty to ſay any thing, but that we do not conſent.

Lord Kilwarden. Are there two pleas, or one plea?

Clerk of the Crown. There are two pleas, my Lord, on the roll.

(The

(The pleas, as they were on the roll, were read to the Court.)

Clerk of the Crown. Cryer, make proclamation for the jury? Gaoler, ſet James Napper Tandy and Harvey Morris forward.

Cryer. You, good men, that are returned to try the iſſue depending between the right honorable his Majeſty's Attorney-General, on behalf of his Majeſty, and James Napper Tandy, anſwer to your names, as you ſhall be called?

(The pannel called over.)

Clerk of the Crown. There are three and twenty, Mr. Attorney-General; they all appear except two.

Mr. Attorney-General. Then ſwear the jury.

Clerk of the Crown. James Napper Tandy, look to your challenges?

The following Jury, of the County of the City of Dublin, was then ſworn.

Richard Harman.	John Woodriffe.
Francis Hamilton.	Charles Mulvaney.
John Halpin.	John Rainsford.
Frederick George Byrnes.	James Murray.
John Dickinſon.	Thomas Corbet.
Edward Bell.	Charles Lorant.

Mr. Attorney-General. We conceive it is the duty of the priſoner's counſel to proceed.

Mr. Ridgeway. My Lords, and Gentlemen of the Jury, in this caſe of the King againſt James Napper Tandy, by an act of parliament paſſed in this kingdom in the thirty-eighth year of the King, it is enacted, that *James Napper Tandy*, among ſeveral others, ſhall ſtand attainted of high-treaſon, and ſhall be liable to all the pains and penalties of law annexed to the crime of high treaſon, unleſs they, and each of them, ſhall ſeverally and reſpectively, ſurrender themſelves to ſome one of the judges of his Majeſty's court of King's-bench; or to ſome juſtice of the peace within this kingdom, on or before the firſt day of December, 1798; and ſhall reſpectively abide ſuch charges as ſhall be made againſt them reſpectively, for, and on account of the ſeveral treaſons aforeſaid, with which they have been charged.

To this *Mr. Tandy* has put in a plea in bar, in which he ſtates, that before the firſt day of December, 1798, the day limited by the act of attainder for time to ſurrender himſelf; to wit, on the 24th of November, 1798, in parts beyond the ſea, to wit, at Hamburgh, he was arreſted and impriſoned, by the command, deſire, and authority, of the King; and has ever ſince been detained in priſon. By reaſon of which arreſt and continual detention, it became impoſſible for him, from the time of the ſaid arreſt, to ſurrender himſelf on or before the ſaid firſt day of December, 1798, and continued ſo impoſſible until after the ſaid firſt day of December.

To this plea of *Mr. Tandy*, the *Attorney-general* has rereplied, that he did not ſurrender himſelf within the time in the act of parliament mentioned; to wit, on or before the firſt of December, 1798; without ſuch cauſe as in his plea alledged. And, my Lords, and Gentlemen of the Jury, on this plea and replication iſſue has been joined.

Mr. Curran (for the priſoner).—My Lords, and you, Gentlemen of the Jury, I am in this caſe of counſel for Mr. Tandy the priſoner at the bar. I could have wiſhed it had been the pleaſure of the gentlemen who conducts this buſineſs on the part of the Crown, if he had gone on firſt: the ſubject itſelf is of a very novel nature in this country, but certainly it is the right of the Crown, and which the gentlemen have thought proper to follow to call on the counſel for the priſoner to go on firſt; and therefore it is my duty, my lords, to ſubmit to you, and to explain, under the direction of the Court, to you, gentlemen of the jury, what the nature of the queſtion is that you are ſworn to try.

An Act of Parliament was paſſed in this country, which began to be a law on the 6th of October, 1798; on that day it received the royal aſſent. By that law it is ſtated, that the priſoner at the bar had been guilty of acts of treaſon of many different kinds: and it enacted, that he ſhould ſtand attainted of high treaſon, except he ſhould, on or before the firſt day of December following, ſurrender himſelf to one of the judges of this Court, or to one of his Majeſty's juſtices of the peace, for the purpoſe of becoming amenable to that law, from which he was ſuppoſed to have fled, in order

order to abide his trial for any crime that might be alledged againſt him.

It was a law not paſſed for the purpoſe of abſolutely pronouncing any judgment whatſoever againſt him; but for the purpoſe of compeling him to come in and take his trial: and nothing can ſhew more ſtrongly that that act of parliament has not eſtabliſhed any thing touching the fact of the priſoner's guilt; becauſe it would be abſurd, in one and the ſame breath, to pronounce that he was guilty of high treaſon, and then call upon him to come in and abide his trial: and the title of the act ſpeaks that it is an act not pronouncing ſentence againſt the priſoner, but that it is an act in order to compel him to come forward.

This act creates a parliamentary attainder, not founded on the eſtabliſhment of the priſoner's guilt of treaſon, but on his contumacious avoidance of trial, by ſtanding out againſt a trial by law. I make this obſervation to you, gentlemen of the jury, in order that you may, in the firſt inſtance, diſcharge from your minds any actual belief of any criminality in the priſoner at the bar, and that for two reaſons; firſt, becauſe a well-founded conviction of his guilt, on the authority of this ſtatute, might have ſome impreſſion on the minds of men ſitting in judgment on the priſoner: but for a more material reaſon I wiſh to put it from your minds, becauſe his guilt or innocence has nothing to do with the iſſue you are ſworn to try.

Gentlemen, the iſſue you are called upon to try, is not the guilt or the innocence of the priſoner: it is therefore neceſſary you ſhould underſtand exactly what it is. The priſoner was called on to ſhew cauſe why he ſhould not ſuffer death, purſuant to the enacting clauſe of the ſtatute; and he has put in a plea, in which he ſtates, that before the time for ſurrender had expired, namely, on the 24th of November 1798, ſeven days before the day that he had for ſurrendering had expired, he was by the order of his Majeſty arreſted, and made a priſoner in the town of Hamburgh; and that in conſequence of ſuch arreſt, it became impoſſible for him to ſurrender himſelf and become amenable to juſtice within the time preſcribed: and the counſel for the Crown have reſted the caſe on the denial in point of fact of this allegation; and therefore, the queſtion that you are to try is ſimplified to this—"I was arreſted," ſays the priſoner, "whereby it be-

came impoſſible for me to ſurrender"—to which the counſel for the Crown reply, "You have not been arreſted at the time alledged by you, whereby it became impoſſible for you to ſurrender." This I conceive to be the iſſue in point of fact joined between the parties, and on which it is my duty to explain the evidence that will be offered.

Mr. Tandy, gentleman, is a ſubject of this country, and had never been in it from the time this act of parliament paſſed, until he was brought into it after his arreſt on the 24th of November 1798: on that day he was in the town of Hamburgh. He had ſeven days, in which time it was practicable for him to arrive in this country, and ſurrender himſelf, according to the requiſitions of the act of attainder. Every thing that could be of value to man was at ſtake, and called on him to make that ſurrender. If he did not ſurrender, his life was forfeited—if he did not ſurrender, his fortune was confiſcated—if he did not ſurrender, the blood of his family was corrupted; and he could leave them no inheritance, but the diſgrace of having ſuffered as a traitor.

Your common ſenſe, gentlemen, will ſhew you, that where a man is to forfeit his life unleſs he complies with the conditions of an act of parliament—your common ſenſe, your common humanity muſt ſhew you, that a man ought to be ſuffered to perform the conditions on which his life depends. It can require no argument to impreſs upon your mind, that to call on a man to ſurrender himſelf on pain of death, and by force to prevent him from ſurrendering, goes to an atrocity of oppreſſion that no human mind can contemplate without horror.

But it ſeems that the priſoner at the bar was a man of too much conſequence to the repoſe of all civilized nations; to the great moral ſyſtem; I might almoſt ſay, to the great phyſical ſyſtem of the univerſe, to be permitted to act in compliance with the ſtatute that called upon him to ſurrender himſelf upon pain of death. The wiſdom of the entire Continent was called upon to exerciſe its meditation on this moſt momentous circumſtance—The diplomatic wiſdom of Germany was all put into action on the ſubject—The enlightened humanity of the North was called on to lend its aid. Gentlemen, you know as well as I, the princely virtues, and the imperial gratifications, the conſummate wiſdom and ſagacity, of our ſtedfaſt friend and ally the Emperor of all the Ruſ-

ſians;

ſians; you muſt feel the awe with which he ought to be mentioned: his ſacred perſon has become embodied in the criminal law of England, and it has become almoſt a miſpriſion to deem him or ſpeak of him but with reverence. I feel that reverence for him; and I deem of him and conceive him to be a conſtellation of all virtue—compared with the radiance of which, the Urſa-major twinkles only as the glow-worm. And, gentlemen, what was the reſult of the exerciſe of this combination of wiſdom? That *James Napper Tandy* ought not to be got rid of in the ordinary way. They felt an honeſt and a proper indignation, that a little community like Hamburgh ſhould embezzle that carcaſe which was the property of a mild and merciful government: they felt a proper indignation that the Senate of Hamburgh, under the preſent ſublime ſyſtem, ſhould defraud the mercy of the government of the blood of the priſoner, or cheat the gibbet of his bones, or defraud the good and loyal ravens of this country of his fleſh—and accordingly, by an order iſſued to theſe miſerable inhabitants of the town of Hamburgh, who were made to feel that common honeſty and common humanity can only be ſuſtained by a ſtrength not to be reſiſted; they were obliged to break the ties of juſtice and hoſpitality—to trample on the privileges that every ſtranger claims; and they were obliged to ſuffer the priſoner to be trampled on, and meanly and cruelly and pitiably to give up this unfortunate man to the diſpoſal of thoſe that could demand him at ſuch a price.

If a ſurrender in fact had been neceſſary on the part of the priſoner; certainly a very material object was atchieved by arreſting him: becauſe they thereby made it impoſſible for him to avail himſelf of the opportunity. They made it impoſſible for him to avail himſelf of the ſurrender, if the reflection of his mind led him to it. If a ſenſe of the duty he owed his family, led him to a wiſh, or tō an intention, of availing himſelf of the remaining time he had to ſurrender; they were determined he ſhould not take advantage of it. He had been guilty of what the law deems a crime, that is, to fly from juſtice, though it does not go to the extent of working a corruption of blood: but by this act of power; by this act of tyrannic force, he was prevented from doing that act which every court of juſtice muſt intend he was willing to do: which the law intends he would have done—

which

which the law gave him time to do—which the law ſuppoſes he might have done, the laſt hour as well as the firſt.—He was on his paſſage to this country; that would not have taken up a third part of the time that had now elapſed—but by ſeizing on him in the manner he was arreſted, it became impoſſible for him to ſurrender himſelf, or become amenable to juſtice. But, Gentlemen, the priſoner, when he was arreſted, was treated in a manner that made it impoſſible for him to do any act that might have been conſidered as tantamount to a ſurrender. He was confined in a dungeon, little larger than a grave—he was loaded with irons—he was chained by an iron that communicated from his arm to his leg; and that ſo ſhort, as to grind into his fleſh. In ſuch a ſtate of reſtriction did he remain for fifteen days; in ſuch a ſituation did he lye in a common vault; food was cut into ſhapeleſs lumps, and flung to him by his filthy attendants as he lay on the ground, as if he had been a beaſt: he had no bed to lie on: not even ſtraw to coil himſelf up in, if he could have ſlept. In that ſituation he remained in a foreign country for fifteen days of his long impriſonment; and he is now called to ſhew good cauſe why he ſhould not ſuffer death, becauſe he did not ſurrender himſelf and become amenable to the law. He was debarred all communication whatſoever: if he attempted to ſpeak to the ſentinels that guarded him, they could not underſtand him: he did make ſuch kind of indications of his miſery and his ſufferings, as could be conveyed by ſigns; but he made them in vain. And he is now called on to ſhew good cauſe wherefore he did contumaciouſly and traitorouſly refuſe to ſurrender himſelf, and become amenable to the law.

Gentlemen of the Jury, I am ſtating facts that happened in a foreign country; will you expect that I ſhould produce witneſſes to lay thoſe abominable offences before you in evidence? It was not in the power of the priſoner at the bar to procure witneſſes; he was not of importance enough to call on the armed civilization of Europe, or on the armed barbarity of Europe, to compel the inhabitants of the town where he was impriſoned, to attend at the bar of this court, to give evidence for the preſervation of his life: but though ſuch interpoſal could not be obtained to preſerve his life, it could be procured for the purpoſes of blood. And it is one reaſon why the rights of neutral ſtates ſhould be reſpected;

becauſe,

becauſe, if an individual, claiming thoſe privileges, be torn from that ſanctuary, he comes without the benefit of the teſtimony of thoſe that could ſave his life. It is a maxim of law, that no man ſhall loſe any thing, much leſs his life, by the non-performance of a condition, if that non-performance had ariſen by the act of God, or of the party who is to avail himſelf of the condition; that the impoſſibility ſo impoſed, ſhall be an excuſe for the non-performance of the condition. That is the defence the priſoner relies upon here. "Why did you not ſurrender and become amenable to juſtice?" "Becauſe I was in chains."—"Why did you not come over to Ireland?" "Becauſe I was a priſoner in a grave in the town of Hamburgh."—"Why did you not do ſomething tantamount to a ſurrender?" "Becauſe I was unpracticed in the language of the ſtrangers; who could not be my protectors, becauſe they were alſo my fellow ſufferers." But he may puſh this reaſoning much farther: the ſtatute was made for the expreſs purpoſe of making him amenable. When the Crown ſeized him at Hamburgh, it thereby made him amenable, and ſo ſatisfied the law. It could not ſeize him for execution, as an attainted perſon, for the time had not arrived at which the attainder could attach. The King, therefore, ſeized him, as a man liable to be tried; and yet he calls upon him to ſuffer death, becauſe he did not make himſelf amenable by voluntary ſurrender; that is, becauſe he did not do that which the King was pleaſed to do for him, by a ſeizure which made it at once unneceſſary and impoſſible for him to do by any voluntary act. Such is the barbarity and folly that muſt ever ariſe, when force and power aſſume the functions of reaſon and juſtice. As to his intention after the arreſt, it is clearly out of the queſtion. The idea of intention is not applicable to an impoſſible act. To give exiſtence to intention, the act muſt be poſſible, and the agent muſt be free. Gentlemen, this, and this only, is the ſubject on which you are to give a verdict. I do think it is highly honourable to the Gentleman who has come over to this country, to give the priſoner at the bar the benefit of his evidence; no proceſs could have compelled him: the inhabitants of foreign countries are beyond the reach of proceſs to bring witneſſes to give evidence. But we have a witneſs, and that of the higheſt reſpectability, who was himſelf at Hamburgh, at the time Mr. *Tandy* was arreſted,

arreſted, in an official ſituation. We will call *Sir James Crawford*, who was then the King's repreſentative in the town of *Hamburgh*. We will ſhew you, by his evidence, the facts that I have ſtated; that before the time allowed to the priſoner to ſurrender had elapſed, *Sir James Crawford* did, in his official ſituation, and by orders from his own government, cauſe the perſon of *Mr. Tandy* to be arreſted in Hamburgh. Far am I from ſuſpecting or inſinuating on *Sir James Crawford*, that any of the cruelties that were practiſed on that abuſed and helpleſs community, or on my abuſed client, were committed at his inſtance or perſonal ſanction; certain am I that no ſuch fact could be poſſible.

I told you before, Gentlemen, that the principal queſtion you had to try was, the fact on which the parties had joined iſſue; the force and arreſt alledged by the priſoner; and the denial of that force by the counſel for the crown. There is one conſideration, that I think neceſſary to give ſome attention to. What you may think of the probable guilt or innocence of the priſoner, is not within the queſtion that you are to decide; but if you ſhould have any opinion of that ſort, the verdict given in favour of the priſoner can be no preclusion to public juſtice, if after your verdict they ſtill call for his life: the utmoſt that can follow from a verdict in his favour, will be, that he will be conſidered as a perſon who has ſurrendered to juſtice, and muſt abide his trial for any crime that may be charged againſt him. There are various ways of getting rid of him; if it is neceſſary to the repoſe of the world that he ſhould die. I have ſaid, if he has committed any crime, he is amenable to juſtice; and in the hands of the law: he may be proceeded againſt before a jury; or, he may be proceeded againſt in another and more ſummary manner: it may ſo happen, that you may not be called upon to diſpoſe of his life or of his character finally. Whatever verdict a jury can pronounce upon him, can be of no final avail. There was, indeed, a time, when a jury was the ſhield of liberty and life.—There was a time, when I never roſe to addreſs it, without a certain ſentiment of confidence and pride; but that time is paſt. I have no heart now to make any appeal to your indignation, your juſtice, or your humanity. I ſink under the conſciouſneſs that you are nothing. With us, the trial by jury has given place to ſhorter, and no doubt, better modes of diſpoſing of life.

life. Even in the ſiſter nation, a verdict can merely prevent the duty of the hangman, but it never can purge the ſtain which the firſt malignity of accuſation, however falſified by proof, ſtamps indelibly on the character of an "acquitted felon." To ſpeak proudly of it to you, would be a cruel mockery of your condition; but let me be at leaſt a ſupplicant with you for its memory. Do not, I beſeech you, by a vile inſtrumentality, caſt any diſgrace upon its memory. I know you are called out to day, to fill up the ceremonial of a gaudy pageant, and that to-morrow you will be flung back again among the unuſed and uſeleſs lumber of the Conſtitution: but, truſt me, the good old trial by jury will come round again; truſt me, Gentlemen, in the revolution of the great wheel of human affairs, though it is now at the bottom, it will re-aſcend to the ſtation it has loſt, and once more aſſume its former dignity and reſpect; truſt me, that mankind will become tired of reſiſting the ſpirit of innovation, by ſubverting every ancient and eſtabliſhed principle, and by trampling upon every right of individuals, and of nations. Man, deſtined to the grave—nothing that appertains to him is exempt from the ſtroke of death—his life fleeth as a dream, his liberty paſſeth as a ſhadow. So too of his ſlavery—it is not immortal; the chain that grinds him is gnawed by ruſt, or it is rent by fury, or by accident, and the wretch is aſtoniſhed at the intruſions of freedom, unannounced even by the harbinger of hope. Let me, therefore, conjure you, by the memory of the paſt, and the hope of the future, to reſpect the fallen condition of the good old trial by jury—and caſt no infamy upon it. If it is neceſſary to the repoſe of the world that the priſoner ſhould die, there are many ways of killing him—we know there are; it is not neceſſary that you ſhould be ſtained with his blood. The ſtrange and ſtill more unheard of proceedings againſt the priſoner at the bar, has made the buſineſs of this day a ſubject of more attention to all Europe, than is generally excited by the fate or the ſuffering of any individual. Let me, therefore, adviſe you, ſeriouſly to reflect upon your ſituation, before you give a verdict of meanneſs and of blood, that muſt ſtamp the character of folly and barbarity, upon this already diſgraced and degraded country.

SIR JAMES CRAWFORD BART. *examined by* MR. PONSONBY.

Q. Were you *Sir James* in any public capacity in the town of Hamburgh, in the month of November, 1798?

A. Yes Sir, I was: I was at that time his Majeſty's Miniſter Plenipotentiary.

Q. Pray, *Sir James Crawford*, did you ever before ſee the priſoner at the bar, James Napper Tandy?

A. I ſaw him on the morning he left Hamburgh.

Q. (Jury). When did Mr. Tandy leave Hamburgh?

A. In the month of November 1798.

Q. Mr. Ponſonby. Pray, *Sir James Crawford*, did you know by whoſe order the priſoner was arreſted in the town of Hamburgh?

A. It was in conſequence of my requiſition to the Senate of Hamburgh.

Q. Is the Senate of Hamburgh the ſovereign power of that ſtate?

A. It is the power which adminiſters the executive authority of the ſtate.

Q. Was that requiſition to the Senate of Hamburgh made by you in your private capacity as an individual, or as a miniſter?

A. It was made by me as his Majeſty's miniſter.

Q. Did you receive orders from the King's miniſter in Great Britain, to make that requiſition?

A. Perhaps the queſtion is not very material in its object: I muſt decline to reveal the inſtructions I received: if it is not to tend to any farther revelation that what relates to Mr. Tandy, I have no heſitation in anſwering the queſtion; if it does, I muſt throw myſelf on the Court.

Lord Kilwarden. If any queſtion ſhould be aſked you which you do not wiſh to anſwer, you may ſtate your objection to the Court.

Mr. Ponſonby. It is only relative to the priſoner.

A. It was in conſequence of orders that were tranſmitted to me by his Majeſty's ſecretary of ſtate in Great Britain.

Q. You mean *Lord Grenville?*

A. Lord Grenville.

Q. Pray, *Sir James Crawford*, was Mr. Tandy detained in cuſtody from the time of his arreſt until after the firſt of December 1798?

A. Certainly.

A. Certainly.

Q. Was that detention alſo in conſequence of your requiſition to the Senate of Hamburgh?

A. Certainly.

Q. Pray, *Sir James*, are you acquainted with the diſtance from Hamburgh to Cuxhaven?

A. I don't recollect the exact number of miles; but I can tell the exact number of hours in going there.

Q. In what time may it be effected?

A. It may be done in ſeven or eight hours.

Q. And from Cuxhaven to England?

A. In about thirty hours: it is poſſible; it is rare, but it is poſſible.

Q. Then in thirty-ſeven hours a perſon may get from Hamburgh to England?

A. Suppoſing he is favoured by the wind; it is rare, but it is certainly poſſible.

Q. I believe Yarmouth is the port generally made, if a perſon wiſhes to reach England quickly.

A. Yes, it is.

Q. Then I am to underſtand, a man may arrive in England from Hamburgh in thirty-ſeven hours?

A. Yes, it is poſſible.

Q. Pray, *Sir James*, was the priſoner committed to cloſe cuſtody after he was arreſted?

A. Yes he was, immediately.

Q. And continued in cloſe cuſtody until after the firſt of December 1798?

A. Yes.

Q. Pray, *Sir James*, I preſume that the perſons who actually executed this arreſt, and who actually watched the perſon of the priſoner at the bar during his detention, were ſubjects of the ſtate of Hamburgh?

A. They were.

Mr. Ponſonby. My Lord, it does not occur to me that I have any other queſtion at preſent to trouble *Sir James Crawford* with.

CROSS-EXAMINED BY MR. ATTORNEY-GENERAL.

Q. *Sir James*, you will allow me to aſk you a few queſtions. Had you any converſation with the priſoner at the bar after the period of his being arreſted?

A. I never had any converſation with him.

Q. Have you been made acquainted with the occaſion of his arrival at Hamburgh?

A. Not by himſelf.

Q. What was the general opinion? Have you heard what was the occaſion of his coming to Hamburgh?

Mr. Ponſonby. You mean, in the priſoner's preſence, Mr. Attorney; for, unleſs he was preſent, it cannot be evidence: general hearſay cannot be given in evidence on a trial of this ſort.

Mr. Attorney General—inſiſted upon his right of croſs-examination.

Mr. Ponſonby—objected to the queſtion, as being irrelevant to the iſſue knit between the parties.

Lord Kilwarden. We think the queſtion ought to be aſked: as to what the tendency may be, we do not know. Mr. attorney aſks, what, the witneſs heard brought Mr. Tandy to Hamburgh? It is impoſſible for us to know how far the queſtion may extend.

Mr. Ponſonby—objected to the queſtion, as it did not go to eſtabliſh ſome fact to juſtify the admiſſibility of hearſay evidence: it went to eſtabliſh a fact, on hearſay evidence, that might be hereafter alledged criminally againſt the priſoner.

Mr Attorney General. I believe I had better go on.

Lord Kilwarden. We give no opinion: the queſtion is, if he heard, merely.

Mr. Juſtice Chamberlain. We admit it, becauſe we do not ſee the tendency of the queſtion.

Mr. Attorney General. I aſk you, have you heard, what was the occaſion of the priſoner at the bar coming to Hamburgh?

A I underſtood that Mr. Tandy was at Hamburgh, on his way to Paris.

Mr. Ponſonby. That is not evidence againſt the priſoner, on this iſſue.

Q. (*Mr. Attorney General.*) Was any application made to you on behalf of the priſoner at the bar, on the ſubject of his arreſt?

A. No application was made to me on the ſubject of his arreſt.

Q. Was any application made to you from any quarter, in order to liberate him from this arreſt?

Mr.

Mr. Ponſonby. By the priſoner's direction?—

A. The magiſtrates of *Hamburgh* made application to me, requeſting that I would conſent to liberate him.

Lord Kilwarden. That anſwer only confirms the direct examination.

Q. (*Mr. Attorney General.*) Do you believe that any application whatſoever was made for him to be liberated, for any, and what purpoſe?

A. I cannot ſay if the application that was made by the magiſtrates of Hamburgh, was in conſequence of any requeſt or petition from the gentleman at the bar.

Mr. Ponſonby. I do conceive, that all queſtions of this ſort ought to be explained; for any thing done before or after his arreſt, has no more to do with the trial of this iſſue, than the antediluvian hiſtory.

Q. (*Lord Kilwarden.*) When did the magiſtrates of Hamburgh make that application to you?

A. The very next day, my lord. There was a great deal of diſcuſſion immediately; and they ſignified their extreme deſire, that I would conſent to the liberation of the priſoner.

Q. (*Mr. Attorney General.*) Do you believe, that between the day of his arreſt, and the firſt of December following, the priſoner at the bar made application to any body, for the purpoſe of coming over to Ireland?

A. I never underſtood that he did.

Q. Do you believe he did?

A. If I might anſwer the queſtion, I might ſay, I do not believe he did.

Q. Did you ever hear, that he complained to any perſon that he was prevented from coming over to Ireland, by the arreſt that took place at Hamburgh?

A. No, I never did.

Q. Can you form any belief of the object or intention with which he ſought at any time to be ſet at liberty?

Mr. Ponſonby. Sir James has not ſaid, that the priſoner did apply at any time between the two periods.

Mr. Attorney General. He ſaid, he believed he was arreſted on his way to *Paris.*

Lord Kilwarden. He ſaid, he underſtood he was arreſted on his way to *Paris.*

Q. (*Mr. Attorney-General.*) Can you form any belief about it?

A. From

A. From what I have heard, I do believe that he came to *Hamburgh*, on his way to *Paris*.

Q. Do you believe he was at liberty to come to Ireland, after the 6th of October, 1798, if he pleaſed?

Mr. Ponſonby. Let the queſtion be limited—

Mr. Attorney-General. That was the day on which the act became in force.

A. He was not deprived of his liberty until long after.

Lord Kilwarden. Be pleaſed, Mr. Attorney, to remember what the iſſue is: we do not know the tendency of your queſtions; but the iſſue is, whether the priſoner was arreſted on the 24th day of November, 1798; and continually kept in cuſtody; ſo that he could not ſurrender himſelf on, or before, the firſt day of December following. We cannot ſee how your examination can bear upon the queſtion before the jury; we only ſay this to apprize you of the iſſue.

Mr. Attorney-General. It would be unbecoming in me to aſk any thing irrelevant to the caſe. It will by and by be neceſſary for me to ſtate to the jury what the iſſue is; and what the law upon it is.

Lord Kilwarden. What anſwer did Sir James Crawford give?

Mr. Attorney-General. That he was at liberty.

Mr. Ponſonby. That he believes he was at liberty.

Q. (*Mr. Attorney-General.*) Pray, *Sir James*, do you believe that the priſoner knew you were his Majeſty's miniſter, through whoſe means he was arreſted?

A. I believe it was ſignified to him at the time he was arreſted.

Q. Have you heard, and do you believe, that the priſoner claimed to be liberated on any account whatſoever?

A. I have heard ſo.

Q. What do you believe of that?

A. I will ſtate on what grounds he required to be liberated: I underſtood that he required to be liberated, as an officer in the ſervice of the French Republic.

Q. Do you believe it?

A. I muſt believe it; becauſe it was ſtated to me by the magiſtrates, who ſaid that the Senate were deſirous to liberate him on that ground.

Q. Do you believe he was an officer in the ſervice of the French Republic?

A. I

A. I do.

Lord Kilwarden. That might prove the fact of treason; but the answer has nothing to do with the issue.

Mr. Ponsonby. I know that question is not evidence on this issue; but I do know that the question and answer may make an impression on the minds of the jurymen, though it has nothing to say to the issue. I do therefore object to its going up to the jury.

Mr. Justice Day. I don't think it ought to go to the jury on this issue.

Q. (*Mr. Attorney-General.*) If application had been made to you, to transmit Mr. Tandy to *Ireland* with all possible speed, would you have assisted him?

A. If application had been made to me, I would have transmitted him to *England* with all possible speed.

Lord Kilwarden. Do you confine that question to the first of December, 1798?

Mr. Attorney-General. I will give the prisoner the latitude of the question in every period.

Q. I ask you, would you have transmitted him from the moment of his arrest, with all possible speed?

A. Yes.

Q. What was the purpose for which he was arrested?

A. For the purpose of transmitting him to England.

Q. If *Mr. Tandy* had been desirous to have come to *Ireland*, would his arrest have prevented him?

A. Certainly the arrest would not; if such a desire had been signified on his part to me, he would have been immediately transmitted to *England*; and therefore the arrest could not have impeded his coming to *England*, a single day; as I conceive at least. At that time he was stated to me to be an officer in the service of the French; but I do suppose, that if he had signified such a wish, that the French minister would not have interposed to prevent it.

Q. Was there any interposition to prevent his coming to Ireland?

A. No: but I do imagine aud suppose that the French minister would have left him his liberty to do as he pleased.

Q. Do you believe that he signified his intention to go any where else?

A. I never heard of his signifying any intention: all I heard was what was generally supposed.

Q. What

Q. What do you mean that you believe of his intention?

A. I have ſtated it already: I believe his intention was to go to Paris.

Lord Kilwarden. The queſtion you aſked, Mr. Attorney, was, if he believed the priſoner ſignified any intention to go any where elſe.

A. (*Sir James Crawford.*) I never heard he ſignified ſuch an intention.

Q. (*Mr. Attorney-General.*) What do you believe?

Lord Kilwarden. If he never heard it how can he believe it.

Q. (*Mr. Attorney-General.*) Why was he detained in Hamburgh?

A. Becauſe the Senate refuſed to deliver him up.

Q. On what ground did they refuſe to deliver him up?

A. On the ground of his being an officer in the ſervice of the French Republic.

Q. (*Lord Kilwarden.*) Who refuſed to deliver him up?

A. The Senate refuſed to deliver him to me, as the King's miniſter; as they ſaid they were afraid of embroiling themſelves with the French.

Q. (*Mr. Attorney-General.*) Can you ſtate if he claimed any privilege on that account?

A. I do believe, at leaſt I was told by the magiſtrates, that he bore a French commiſſion; and I underſtand that the magiſtrates had received that information from himſelf, or from ſome perſon on his behalf?

Q. Do you believe the claim was made by him?

A. Yes.

Q. (*Lord Kilwnrdan.*) What claim?

Mr. Attorney General. That of being a French officer.

Sir James Crawford. I ſaid I believed ſo: that I underſtood ſo: that it was ſtated ſo to me by the magiſtrates.

Q. (*Mr. Attorney-General*) Do you believe that the arreſt on him was the cauſe why he did not ſurrender himſelf in Ireland; or that it prevented him?

A. I do not believe it prevented him.

Q. I now aſk you, do you believe but for that arreſt, that *Mr. Tandy* would now be in the city of Dublin?

A. I believe if that arreſt had not taken place, he would not have been here.

Q. Not been in Ireland ſince?

A. Not

A. Not been in Ireland; probably he would not.

Q. (*Lord Kilwarden.*) Is it probably you ſaid?

A. Yes, my Lord, probably he would not.

Q. (*Mr. Attorney-General.*) Do you believe, that if the arreſt had not taken place, that he would have been voluntarily in Ireland, to have ſurrendered himſelf, before the firſt day of December, 1798.

A. That he would have been voluntarily: No.

Q. I think you ſaid before, that no application was ever made to you, to enable him to do ſo, previous to the firſt of December, 1798.

A. No application to that effect was ever made to me.

Q. And you ſaid you would have tranſmitted him, if ſuch an application had been made?

A. I ſhould have tranſmitted him to *England.*

Q. Would you not have tranſmitted him to *Ireland?*

A. No, I don't think I would: I ſhould certainly to *England.*

Q. (*Lord Kilwarden.*) To what port?

A. It is impoſſible, my Lord, for me to ſay to what port he might have gone.

Q. (*Mr. Attorney-General.*) Pray, *Sir James,* what do you conſider to be the ſhorteſt courſe you would take for expedition from *Hamburgh* to *London?*

A. I ſhould go, I believe, as far as my knowledge dictates, firſt to *Cuxhaven,* then to *Yarmouth,* and ſo through England.

Q. You ſay you arreſted the priſoner in *Hamburgh,* by an order communicated by the Secretary of State in England?

A. Yes.

Q. Did you know for what he was arreſted?

Mr. Ponſonby. I don't think any anſwer that can be given to that queſtion, can be conſidered as evidence.

Lord Kilwarden. I cannot ſee its tendency: the queſtion aſked is, why he was arreſted.

Mr. Attorney-General. For the preſent, we will requeſt *Sir James Crawford* to go down.

Lord Kilwarden. *Q.* Did you ever communicate to the priſoner, that you were willing to ſend him to Ireland?

A. No, my Lord.

Q. Could you have tranſmitted him to *Ireland,* or muſt you have ſent him to *England?*

A. I

A. I think I ſhould have ſent him to *England*, if he had ſtated to me the circumſtances of this act of parliament, which limited him to ſo ſhort a period; probably I ſhould have done every thing in my power to expedite him.

Q. Could you have ſent him immediately if he had applied to you, without the leave of the Senate of Hamburgh?

A. That was impoſſible; for he was arreſted by the officers *Hamburgh.*

Q. Then you had not the power?

A. I had not, without the Senate's conſent.

Q. Pray, *Sir James*, if you had the power, could you have ſent him the next day, if the priſoner had ſignified his conſent or wiſh?

A. I cannot exactly ſay if I could have ſent him on the next day: that depended on procuring proper perſons to convey him to *Cuxhaven*, where his Majeſty's ſhips of war lie that would have conveyed him to England. I cannot ſay if I could have ſent him on the 24th, or not.

Mr. Ponſonby. I would wiſh to ſuggeſt a queſtion to the Court; it may be unneceſſary: it is, if he knows what is the diſtance from *Yarmouth* to *London*?

Q. Lord Kilwarden. How far is it from *Yarmouth* to *London?*

A. I believe 120 or 140 miles.

MR. GEORGE SMITH EXAMINED BY MR. PONSONBY.

Q. Pray, Mr. Smith, were you ſent on behalf of the priſoner to the town of *Hamburgh* in *Germany?*

A. I was.

Q. Will you look at that? (A parchment produced.)

A. It is a ſubpœna.

Q. Out of this Court?

A. Yes, Sir.

Q. What perſons did you ſerve with that ſubpœna?

A. I firſt ſerved *Sir James Crawford*; and *Mathias Myer*, firſt officer of juſtice at *Hamburgh*, who arreſted Mr. Tandy. I have marked the ſervices on the back of the writ.

Q. Did you ſerve any other perſon?

A. I ſerved *Ferdinand William Wallbourn.*

Q. I preſume you mean the other officer in the executive government of Hamburgh, by authority of the Senate.

A. He aſſiſted in the arreſt of Mr. Tandy.

Q. You

Q. You ſtate, that Mr. Myer was concerned in the arreſt of Mr. Tandy.

A. So he informed me.

Q. Pray, Sir, did thoſe perſons obey the ſummons?

A. They did not.

Q. Prav, Sir, were you empowered to offer to defray their expences?

A. I was.

Q. Did you make ſuch an offer?

A. I did, to any amount, if they would come and give their evidence in this Court.

Q. To whatever amount they choſe to fix their expences, you offered them?

A. I certainly did.

Mr. Ponſonby. You may go down.

Lord Kilwarden. Mr. Attorney General, will you croſs-examine this witneſs.

Mr. Attorney. No, my Lord.

Mr. Ponſonby. Then, my Lords, we reſt our caſe, on the part of the priſoner, here.

Mr. Attorney General—addreſſed the Court, and ſaid it would be neceſſary for him to ſay a few words, before he called the witneſſes intended to be produced: and would call the attention of the Court to the nature of the iſſue to be tried between the King and the priſoner at the bar. *Mr. Attorney-General* then ſtated the penal clauſe of the ſtatute, for which ſee page 9.

On this clauſe of the act, a ſuggeſtion had been put on the roll of the Court, which was now part of the the record, that in conſequence of the priſoner not having ſurrendered himſelf within the time preſcribed by the act, to wit, on or before the firſt day of December, 1798, he had become attaint; and to that ſuggeſtion a plea had been put in by the priſoner, which formed a part alſo of the record, and led to the iſſue that was to be tried; which ſtated, that he the ſaid *James Napper Tandy*, before the firſt day of December, 1798, the time limited by the act of parliament for him to ſurrender, to wit, on the twenty-fourth day of November, in the ſame year, at Hamburgh, was a cloſe priſoner, by order of the King: and to this plea had been put in a replication, on the part of the crown, that he did

not ſurrender himſelf before the firſt day of December; and that he was not prevented for ſuch cauſe as in his plea mentioned.

He begged pardon of the Court, and of the jury, for calling their attention to what the iſſue really was, that was to be tried; and hoped the gentlemen of the jury would excuſe him, if he did not follow the learned counſel who opened the caſe on behalf of the priſoner, through all the vaſt varieties of irrelevant and ſtrange matter ſuggeſted by him. He truſted he did feel that he was doing a ſerious duty, and fulfilling the ſituation in which he was placed, as he ought, by confining himſelf to the law and the facts of the caſe, which a tribunal of juſtice in the kingdom of Ireland was then ſolemnly called upon to determine. It was not any part of his duty, on this occaſion, to exculpate the conduct of the Emperor of all the Ruſſians; or to explain to the jury, what the *Urſor Major*, or the Conſtellation of the North, had, or had not, to ſay to this queſtion: but he would call the attention of the Court to the matter of law; and the attention of the jury to the matter of fact. It was not neceſſary for him to follow the learned counſel through his lamentable deſcription of what men may ſuffer who become fugitives from their native country, and are detained in foreign priſons; but he would, in this ſtage of his duty, endeavour to maintain and ſupport the humane law of this realm, which knew of no ſuch barbarous treatment to malefactors, as the learned counſel had ſtated. He had no doubt that ingenious addreſs was calculated for ſome other purpoſe, than merely to impreſs on the minds of the Court and the jury, the treatment this man met with in a foreign country. He was not afraid the trial by jury would ever ſuffer or diminiſh; no ſuch thing could ever happen: he was appealing to a jury of the country, and vindicating that conſtitution that made the trial by jury the medium of juſtice.

He would addreſs himſelf to the Court; and with great deference to their judgment, ſubmit, on principle and decided authorities that could not be denied, what the iſſue to be tried in the preſent caſe was.

The learned gentleman who ſtated the priſoner's caſe, had ſaid, the preſent was an unuſual caſe: it was not an unuſual caſe; for every man that was acquainted with the hiſtory of this country knew, that in conſequence of the rebellion, both

in

in Great Britain and Ireland, ſimilar acts had been found neceſſary to attach to many men who became fugitives from the law, the puniſhment of high treaſon. He begged to diſclaim any intention of founding any argument by inference againſt the priſoner at the bar, on any thing that was not relevant to the iſſue. It was not a ſubſtantive treaſon for which he was to be tried; but with deference to the Court, he would tell them what was of conſequence for the jury to know and to believe: it was, whether after the period at which the priſoner was arreſted, there was any intention or diſpoſition in the party ſo arreſted, to become amenable to the law by which he was bound to ſurrender himſelf, or to lie under the penalties attached to his diſobedience: and whether any act on the part of the Crown, by means of the arreſt, was the cauſe of thoſe intentions not having been fulfilled. This, he ſubmitted, was the queſtion to be decided by the event of this iſſue.

The Court well knew, that, in a caſe like the preſent, the jury ought to be informed; as he was ſure they would be, from the Court, that many caſes have happened under the laws of Great Britain, on ſimilar ſubjects. There was one claſs of caſes that was ſimilar to the preſent in point of principle, which are the ſubject of fugitive bills; he meant, the caſe of outlawries; when outlawries have been had at common law, and indictments found againſt the parties: againſt whom outlawries by the law may be ſet aſide, if the party outlawed comes in within a certain time, provided he be within the realm at the time of the law paſſing; and which, ſhould the party be out of the realm at the time, ſhall be enlarged to a farther period, that the party may have an opportunity to come within the realm. He did admit it to be ſettled law, that if a man ſhould be arreſted within the period given by the law for him to ſurrender himſelf, and that he ſhould ſignify a deſire, and that it ſhall be his manifeſt intention (he having been arreſted by a competent power, at the deſire of the King) to be amenable to the law, and pray to be brought before a competent juriſdiction to have his ſurrender received; that very intention and deſire ſo to ſurrender, manifeſted by the perſon arreſted, was the evidence to go to the Court and the jury, in order to entitle him to the benefit of his ſurrender, as if it had been made in time: and all the caſes that had ever happened on this ſubject (and he was giving the priſoner the greateſt latitude that was ever

contended

contended for by a priſoner) make directly in favour of the Crown, on the iſſue before the Court. He would recite two caſes that do not go ſo far as the preſent: the firſt was the caſe of *Roger Johnſon*, reported by *Foſter*; but better reported in 2 *Strange*, 824. The defendant was outlawed upon an indictment for high treaſon, and had been arreſted on the 27th of April 1746, and eſcaped from priſon; and after the period of his eſcape, the outlawry was compleated againſt him on the 8th of February in the enſuing year: he, after the period of being retaken, was brought to the bar of the Court of King's Bench by *habeas corpus*, and there offered to ſurrender himſelf, purſuant to 5 & 6 *Ed.* 6. *c.* 11. it being within the year: and in that caſe he pleaded that he was beyond ſea at the time of the outlawry being compleated; and iſſue was joined on that fact; and it was inſiſted in that caſe, that he, being a priſoner, offered to ſurrender himſelf to law within the year: and it was ſettled in that caſe, that though the priſoner was a captive, it did not take away his right of ſurrender, and being amenable to juſtice.

Mr. Juſtice Day. It was in Court *Johnſon* offered to ſurrender himſelf when he was brought up by *habeas corpus*.

Mr. Attorney General ſaid, That was the fact: and he recollected, that on arguing *Johnſon's* caſe on behalf of the Crown, another caſe was reſorted to, of a former period, where *Sir Thomas Armſtrong* was denied that right which the priſoner at the bar at preſent enjoyed.

In the caſe of *Murray*, which was reported in *Foſter*, page 50; he was brought before Lord Chief Juſtice Clerke, on the 28th day of June, fourteen days before the time limited by the act for ſurrender had expired; and was by him the ſame day committed to the caſtle of Edinburgh, where he was kept a cloſe priſoner till he was removed to the town. This great man (*Judge Foſter*) went on and ſaid, "Whoſoever conſidereth this, muſt admit, that with whatever view he might be brought up at this time, he had merely that juſtice done him now by his Majeſty's order, which at one time or other, whenever he ſhould have been brought up on the foot of the attainder, could not be denied."—He would now go to that part of *Murray's* caſe on which he had no doubt the argument would turn. In the former caſe, the intention of the act was anſwered by his being made amenable to juſtice before the time limited for his ſurrender had expired;

and

and his being kept a close prisoner 'til the day of the surrender was passed, it was out of his power to comply with the terms of the act; and therefore his non-compliance ought not to be fatal to him.

Lord Kilwarden. Did not Mr. *Murray* offer to surrender him?

Mr. Attorney General—said, It was matter of history in the case: *Murray* offer to surrender himself and become amenable to justice: he pleaded that he did offer to surrender. And much of the present case would turn upon the meaning of the word "*amenable.*" Murray did plead that he did surrender himself: and the truth of that plea was confessed in point of fact; and it was deemed being amenable within the meaning of the law.

Before he came to argue upon the case of *Lord Duffus*, which he would read and let go up to the Court and the jury, with all its imperfections on its head; he was willing to take that case upon the arguments of the counsel for the petitioning *Lord Duffus*, the heir of the attainted *Lord Duffus*—as to what would be the law as contended for by them. The case lay within a narrow compass, and he would read it; as the Court and the jury, who were highly concerned in the duty they had to fulfil, ought to be made acquainted with it.

Lord Kilwarden. From what book do you read it?

Mr. Attorney General. From *Comyn's Reports, p.* 440. By an act passed 1 Geo. 42. it was enacted, "that whereas *George*, Earl of *Marischall*, *Kennet*, Lord *Duffus*, and several others, did, on or before the 13th of November, 1715, in a traitorous manner, levy war, &c. and are fled to avoid prosecution, &c. if they render not themselves to one of his Majesty's justices of the peace, on or before the last day of June, 1716, every of them not rendering himself as aforesaid shall, from said 13th day of November stand, and be adjudged of high-treason," &c. He resorted to this case, as mentioned in Justice *Foster*'s note on *Murray*'s case; where it was stated that "*Lord Duffus* was not amenable to justice before the expiration of the time given by the act; nor, "*merely through his own fault could be.*" In order to carry the attention of the Court and the jury to what import the word *amenable* had: and whether, under the construction of law, the prisoner could be deemed by the evidence produced, that he did intend to be amenable to justice. He would read the

other

other paſſage, and then ſtate the facts as they appeared in evidence.

"On the 15th of May, 1716, *Lord Duffus* wrote to Sir *Cyril Wyche*, deſiring to throw himſelf at his Majeſty's feet, and to make a viſit to him for that purpoſe, and did ſo at Hamburgh, where Sir Cyril was then reſident, as a public miniſter for the King."—The caſe in every circumſtance was nearly ſimilar to the preſent caſe: the place, where he was arreſted, was the ſame; and a miniſter there in the ſame ſituation with Sir James Crawford.

"On the 2d of June he ſet out for England, by a ſhip from ——, and came to Hamburgh, where, on the 29th day of June, he was ſeized and taken into cuſtody, and was afterwards ſent to England and committed to the tower; but pardoned by king *George*." Upon this caſe, *Lord Duffus* petitioned the King, which petition was referred to the Lords, and it was inſiſted by his counſel, that "*Lord Duffus* was not attainted by this act of parliament, ſince he was *minded* to ſurrender himſelf, and coming into England for that purpoſe, but was prevented by the King's miniſter abroad, who ſeized and detained him in Hamburgh, from whence he was ready to ſail for England to *render* himſelf there to juſtice."

Mr. Attorney-General—continued. He ſaid that when he was aſking *Sir James Crawford*, about the wiſh or intention of the priſoner to ſurrender, it was to demonſtrate to the jury, that he was not minded, nor had any intention, to make himſelf amenable to juſtice: facts, which though proved in the caſe of *Lord Duffus*, were ſo far from being proved in the caſe before the jury, that they were abſolutely negatived. He wiſhed that every word coming from *Lord Duffus*'s counſel, ſhould go to the jury; becauſe the iſſue knit between the preſent parties in the manner it was let in the queſtion of intention on the whole of the caſe. He, therefore, thought it his duty, again to remind the jury what the iſſue was: the ſuggeſtion was, that the priſoner did not ſurrender himſelf, and become amenable to juſtice—and the plea was, that he was arreſted; by which it became impoſſible for him to do ſo.

Mr. Juſtice Downes. And that he was rendered incapable from the time of the arreſt.

Mr. Attorney-General. The replication to the plea was, that he did not ſurrender himſelf purſuant to the ſtatute,

"*with*

"*with ſuch cauſe.*" Before he came to the words of the plea, he would contend, that it tendered an immaterial iſſue; becauſe, for any thing alledged in that plea, it did not appear that by any act of the King, or any other power, from the ſixth day of October, that he was prevented from becoming amenable; or that from that period to the firſt day of December following, he was prevented in conſequence of any deſire expreſſed by him for that purpoſe, to become amenable: but confining the period from the *twenty fourth* day of November, on which he was arreſted, until the *firſt* day of December, on which he became attaint, it did not appear that he was minded, or had any intention, or deſired to have an opportunity of ſurrendering: and was, in conſequence of ſuch deſire, prevented from ſo doing. The reaſon for his urging this was, that in the caſes recognized to be law, as they relate to the preſent on principle, it was on the party to ſhew, by pleading and evidence, that he was minded, and had an intention, to ſurrender; and if the jury were to take the plea as tantamount to that purpoſe, in letting in that proof, the conſtruction they ought to put upon it was, that the priſoner had made the requeſt, and was refuſed; otherwiſe it was an immaterial iſſue: becauſe, in legal pleading they were bound to give legal interpretations to words, and if they would bear out the caſe, otherwiſe they were immaterial. The material iſſue ought to have been tendered to this effect—"I was minded to ſurrender; but in conſequence of that arreſt I was rendered incapable of doing that which it was in my mind to do." Unleſs the jury gave ſuch a conſtruction to the word "*impoſſible,*" the iſſue was immaterial. On the whole of the matter, the material iſſue to be tried was, nothing elſe than this—namely, whether it was his intention to ſurrender—and that his intention was fruſtrated by the act of the King operating on him by the arreſt. How did *Lord Duffus* caſe bear againſt the preſent? *Lord Duffus* went to *Hamburgh*, from whence he was ready to ſail to England (this was the argument of the counſel to reverſe the attainder), to ſurrender himſelf to a juſtice of peace, according to the act of parliament—that he had an intention to ſurrender, appeared by his application to the King's miniſter for that purpoſe—and accordingly he ſet out for *Hamburgh*, and there he was arreſted.—It was for that reaſon, *Mr. Attorney-General* ſaid, he had been particular in aſking *Sir*

James Crawford, what was Mr. Tandy's intention of coming to Hamburgh, and if he believed it was in order to render himself amenable to justice. If it was in the mind of the prisoner at the bar, as in *Lord Duffus*, an intention of coming to England; or if there was a shadow of proof that he wished to be amenable to justice, he ought not to be deprived of the benefit of the law. *Lord Duffus* case was argued at the bar of the House of Lords, and it was urged, "that it is a sufficient performance of a condition, if it be performed in substance, although every circumstance is not pursued; and although he could not surrender himself to a justice of peace, yet he had surrendered himself to one of the King's ministers; and was afterwards sent over, and might have been tried, which was all the design and end of the act of parliament:" and secondly, it was urged, that the intention was the issue; and that the proof of the intention was to be taken from "the letter to the King's minister, and his having set out and got as far as Hamburgh, on his way to England, where he was seized."—In that case, the intention was not controverted; but in the present case, it was absolutely negatived. The jury would be regulated, in matters of law, as they rose in the case, by the opinion of the Court; and the judges would be regulated by adjudged cases.

He would conclude reading the case of *Lord Duffus*; but he was not driven to the necessity of contending for the rigour of it: it might have deserved that animadversion made by judge Foster.

"The matter of law (says the reporter, who was a witness to the transaction) was referred to the opinion of the judges present; who were the chief justice *Eyre*, and myself: and we were of opinion, that this was not a compliance with the act of parliament; nor could any inferior Court, if the *Lord Duffus* had been arraigned before them, construe it so to be: for all he could say for himself had been, that he had surrendered himself according to the act; which fact, if it had come to be tried, must have been determined by a jury; who upon evidence could not justly say, that he did render himself to a justice of the peace as the act directs; or if they had found the matter specially, the Court could not adjudge it to be a render according to the intent of the act; for the legislature may put upon an offender what terms it pleases; nor can an inferior court hold any other terms to

be

be equivalent to them: that muſt be an act of the legiſlature itſelf.

"And I mentioned the caſe M. 8 H. 4. 12. which was this: *Sir Thomas Brooks* coming to the parliament—5 H. 4. one *John Savage* fell upon *Richard Cheddar* his ſervant, who was attending him, and having grievouſly wounded him, he fled; upon which *de adviſamento procerem ad requiſitionem communitat' ordinatum fuit*—18 *Mart' in dicto parliamento*; that proclamation ſhould be made at the place where the fact was done: and if *John Savage* did not render himſelf to the Court of King's Bench within a quarter of a year after; he ſhould be convicted of the offence, and pay double damages to the party.

"Proclamation was made in *Eaſter Term*, 5 *H.* 4. and he not rendering himſelf within the time, a capias was awarded againſt *Savage*, returnable *M.* 5 *H.* 4. and he not appearing, *Chedder* ſued for the double damages: and *Savage* in bar ſaid that he had rendered himſelf to the King at *Pomfret*, within the time, in the preſence of the biſhop of *Ely*, then lord chancellor; and the King committed him to the cuſtody of the duke of *Lancaſter* lord ſteward, where he could not render himſelf to the juſtice of the King's Bench: but the Court ſaid, the order of parliament could not be varied by any inferior Court; therefore his ſurrender of himſelf to the King, ſince he did not render himſelf to the juſtice as the proclamation required, was of no avail.

"*Talbot*, lord chancellor, and lord *Hardwicke*, approved the opinion, and the lords rejected the petition."

On this caſe, *Mr. Attorney General* ſaid, He would not argue againſt the opinion of judge Foſter, who ſaid it favoured too much of the *ſummum jus*: but he would maintain, that it was incumbent on the party to ſhew a manifeſt intention that he was minded to become amenable; and that the act of the King prevented him. Having ſaid thus much, he would ſtate the nature of the evidence he intended to produce.

The arreſt of the priſoner had been proved by *Sir James Crawford*; who alſo ſtated, that the intention of the priſoner was not to come to England; and that he underſtood the priſoner was an officer in the ſervice of the French republic, at preſent at war with the King. The queſtion of intention being let in; and it being impoſſible for the Court to pre-

clude it, he thought himſelf warranted to ſhew acts of the priſoner, demonſtrative of his having no intention to ſurrender himſelf: becauſe, if intention was the defence of the priſoner; counſel for the Crown had a right to ſhew, that he was not minded to become amenable to the law to which he was ſubject.

It had been ſtated by the counſel, very differently from what had appeared in evidence, that the priſoner was a ſubject of this realm; no man felt ſo much as *Mr. Attorney General*, that he had not been always ſo. But he was arreſted in Hamburgh, where he did not come for the purpoſe of ſurrendering himſelf; and where he could not have been, if he was not a fugitive: arreſted in a foreign country on his way to *Paris*.

Mr. Curran. It was only from hearſay that evidence was given.

Mr. Attorney General—ſaid, he allowed that: but it was not from hearſay that he was arreſted in *Hamburgh*; and that he made no offer to ſurrender. What was the nature of the iſſue? No proof had been given to ſhew it was the priſoner's intention to ſurrender himſelf; or that any thing was done if he had ſuch an intention to carry it into effect. He was ready to prove that the priſoner did flee from the coaſt of Ireland: that he had come to Ireland from the French directory, and acted under their authority. He did not wiſh to anticipate the evidence he would produce: he wiſhed it might be underſtood in every part of the world where the report of this caſe might go, that every man in this country was treated with a tenderneſs almoſt unknown to any other nation. He had waited, month after month, to give the priſoner an opportunity of inveſtigating his caſe: he had poſtponed it from term to term, and from day to day: every aid that could be given, was granted to the priſoner, to aſſiſt him in procuring his proofs; the accredited foreign miniſter of the King brought forward to give his aid: and he begged it might not be hinted by any perſon, in argument or otherwiſe, that there were loyal ravens deſirous for the fleſh of the priſoner: No—the wiſh and intent of the Crown was to give him the protection of that law, which he and others had meditated to overthrow. The country poſſeſſed a trial by jury, and would keep it; and ſhe had her Court of King's Bench: and after all that had convulſed the world,

there

there was a jury in the box of that very place of which this gentleman had endeavoured to deſtroy. If he knew any mode to bring proof to manifeſt the priſoner's intentions to have become amenable to juſtice, he would aſſiſt him: he had conceded to every motion made for their advantage, conſiſtently with his duty to the reſponſible ſituation he ſtood in.

Mr. Prime Serjeant—ſaid, that, on the part of the Crown, they would call the poſtmaſter of *Rutland*; by which they would ſhew, that, on the 16th day of September, 1798, the priſoner was at Rutland in the county Donegall, after the act of attainder had paſſed both houſes of parliament, but before it received the royal aſſent; in order to ſhew, that he was in Ireland exerciſing a foreign commiſſion under the French republic; and that he afterwards departed the coaſt. He conceived this evidence to apply thus—that the eſſential part of the iſſue was the intention of the priſoner to ſurrender, which he was prevented from doing by an act of power, ſo his being in Ireland under circumſtances he mentioned, would go to ſhew he had no ſuch intention. The witneſs would not be produced to prove any act of treaſon; but to ſhew that the priſoner was in Ireland at a late period; and that by his declarations made there, that he had no intention of ſurrendering himſelf.

Mr. Ponſonby—objected to the admiſſibility of any ſuch evidence on the iſſue: becauſe it was an iſſue ſimple in its nature, namely, whether the priſoner was arreſted on a certain day, in a certain foreign country, and the continuing of that arreſt from that day to the preſent; and that was the excuſe put in the pleading, for the priſoner not being involved within the intention and proviſion of the act of parliament: which act was not in exiſtence until the ſixth day of October; and now evidence of an act, ſuppoſed to be committed on the 13th of September, was offered to ſhew what was the intention of the priſoner, from the ſixth day of October to the firſt day af December following. If evidence of acts committed on the 15th day of October, could be given in evidence, then the acts of every day of the priſoner's life preceding might be given: for there was no particular ,virtue attached in law to the 15th of September: it was not a day fitter for teſtament than any other in the year; nor more pregnant with opportunities of affording evidence. The very act alluded to have taken place on that day, if

founded in truth, of which there was no evidence, could not be comprehended in the intent of the bill: if it did, what was the conſequence? The counſel for the crown were to be allowed to go into evidence, to ſhew that the priſoner had no intention on the 15th day of September, to do an act that was not declared a crime until the ſixth day of October following. Beſides, the fact now attempted to be given in evidence, might have been the foundation of the ſtatute.

Mr. Curran. I beg to make a remark—

Lord Kilwarden. At preſent you need not trouble yourſelf, unleſs the gentlemen on the other ſide wiſh a ſecond gentleman to ſpeak.

Mr. Attorney General—offered to give in evidence, papers, which he ſaid were in the hand-writing of *Mr. Tandy.* He offered this evidence to ſhew, that the priſoner's intentions of not ſurrendering himſelf, as had been proved by *Sir James Crawford*, was an exiſting principle in his mind, antecedent to the period of the paſſing the act of parliament. As to the fact of the priſoner holding a French commiſſion, there was evidence to go to the jury.

Mr. Juſtice Downes. Do you perſevere in offering the evidence of the priſoner being in Ireland in September?

Mr. Attorney-General—ſaid, the point of view in which he felt the eividence relative to the written papers, and the priſoner having been in Ireland, was demonſtrative of his fixed principle, not to be amenable to juſtice. The ſecond fact, material to the iſſue, was, his holding the foreign commiſſion; which was the cauſe, *Sir James Crawford* believed, that made the priſoner claim to be exempt from any authority that ſhould ſend him to Great-Britain: of that there was evidence to go to the jury. He contended, ſubſtantive acts might be given in evidence, to ſupport a charge on the ſame ſubject: in the crime of murder charged to be committed at a particular time, if the crime be once proved, there can be no better proof than the declaration of the party on the ſubject of the criminal intention: to inſtance in the charge of treſpaſs, which is confined to a particular period, there was nothing ſo ſettled in point of law as, that the intention of the party might be proved by retroſpective evidence, after the fact of the treſpaſs had been eſtabliſhed. In the preſent caſe, it lay upon the counſel for the priſoner

to

to prove the affirmative of the iſſue, and they proved a ſimple arreſt; in conſequence of which, it was alledged, that the priſoner could not ſurrender himſelf: the counſel for the crown wiſhed to controvert by proof of acts of the party himſelf, and by his declarations bearing on the ſame ſubject, that he never had ſuch an intention: they were not, therefore, tied down to the ſtrict rule of law, as they would be in eſtabliſhing the crime of treaſon. They did not offer the evidence to eſtabliſh any particular fact, but to contradict that evidence given by the priſoner; and therefore they offered firſt, the declarations of the party on the ſubject, to ſhew what his intentions were: and as affirmative of the fact of holding the French commiſſion, in right of which he ſought to be liberated, in order to go to Paris.

Mr. Curran. I hope, my Lords, it is not neceſſary for me to ſay any thing farther on the objection for the priſoner, to the inadmiſſibility of this evidence.

Lord Kilwarden. We don't think it neceſſary. The firſt thing inſiſted upon, as evidence for the crown, is, that on the 15th of September, 1798, the priſoner being in the kingdom of Ireland, did declare, that he was under a commiſſion from the Republic of France; and this evidence is offered to ſhew, that the priſoner had no intention on that day, to ſurrender himſelf purſuant to the act of parliament: and counſel for the priſoner object to this evidence being received.

Mr. Attorney-General. That was not exactly the point of view in which I took it; but as affirmative of the fact of holding a French commiſſion.

Lord Kilwarden. The evidence given by *Sir James Crawford*, on the croſs examination, was with a view to ſhew that the priſoner had no intention to ſurrender himſelf, purſuant to the requiſition of the act of parliament. And the objection made by Mr. Ponſonby, is formed on this—that it is not the iſſue knit between the parties. In my apprehenſion it is not the iſſue knit between the parties; and ſuppoſing it went to ſupport that poſition, that the intentions of the party was a ſubject matter of enquiry now, I ſhould think it did not ſupport it; but it is not now neceſſary to deliver any opinion on what the fact of intention or want of intention was. The queſtion is the iſſue joined: the priſoner was brought up to the bar of the Court, and was aſked if he could

could ſhew any good cauſe why judgment ſhould not be awarded againſt him, purſuant to the record in the Court: to this the priſoner put in a plea, that he was arreſted by order of the King, on the 24th of November, in a foreign country, and that it thereby became impoſſible for him to ſurrender on or before the firſt day of December, 1798; the day appointed for that purpoſe. To this plea *Mr. Attorney-General* put in a replication; and by that replication he did aver, that Mr. Tandy did not ſurrender himſelf, without ſuch cauſe as in his plea alledged. The queſtion, therefore, to be tried, is, whether there was ſuch a cauſe to prevent his ſurrendering as is averred by him on the record, whether he was arreſted on the 24th day of November, 1798, by command of the King, and under that arreſt kept in priſon; and by reaſon of that arreſt and continual impriſonment it was impoſſible for him, to the laſt hour of the firſt day of December following, to ſurrender himſelf. What his intention was, or might have been, under the authority of the caſe ſtated to the Court, does not at all come before the Court: and I do think, let his intention be what it might, it does not affect the iſſue. This evidence is produced to ſhew, that his intention was not to ſurrender himſelf: I conceive it not to be admiſſible in this iſſue: it is not attempted to ſhew that he was not arreſted, and that there was a poſſibility of his ſurrendering: but it is to ſhew that which does not bear on the preſent queſtion, and is not admiſſible evidence.

Mr. Juſtice Downes. The evidence offered is that of the priſoner acting under a foreign commiſſion, antecedent to the time of paſſing the act of parliament; and for any thing that may appear, this act may be the very act of treaſon that occaſioned the paſſing of that ſtatute; and then offering this kind of evidence, is calling upon the priſoner, whoſe guilt or innocence is not in iſſue, to try a fact which may have been the cauſe of the ſtatute, and without any notice to the priſoner, to bring an original act of treaſon before the Court. This evidence is brought forward with a view of proving the intention of the priſoner. What intention? Not his intention to ſurrender. Suppoſe the intention was material to the iſſue, it is antecedent to the act that calls upon him to ſurrender himſelf had paſſed. I do agree with my *Lord Kilwarden*, that the priſoner's intention is not material to the

iſſue

iſſue knit between the parties; but the queſtion is the naked fact—whether he was arreſted and confined, and in conſequence of ſuch arreſt and continual impriſonment, he was thereby prevented from ſurrendering himſelf, until the period limited by the ſtatute had expired. And in my apprehenſion, whether he held a commiſſion in the French ſervice, or not, on the 16th day of September; or that on that day he did, or did not, intend to ſurrender, purſuant to the act of parliament, do not bear on the fact of the iſſue knit between the parties.

Mr. Juſtice Chamberlaine. I agree with the Court, that the intention of the priſoner has nothing to do with the preſent iſſue. I will ſuppoſe that on the day he was arreſted he did not intend to ſurrender himſelf; yet under the act of parliament, he had a right to the laſt moment of the day limited to ſurrender himſelf: he was arreſted and confined, and the queſtion is, whether it thereby became impoſſible for him to comply with the requiſitions of the act of parliament.

Mr. Juſtice Day. The only queſtion for the jury to try is, if it was poſſible for the priſoner to ſurrender himſelf in purſuance of the act of parliament after he was arreſted.

Mr. Attorney-General. The only ground on which I offered this evidence, was, that the acts of the party before his arreſt, were evidence to ſhew, that he had no intention at any time to become amenable to juſtice.

Lord Kilwarden. The Court does conceive that they have given no opinion that can on principle diſturb the caſes cited from the bar. I conceive the caſe of *Lord Duffus* to be law; but not applicable to the preſent caſe.

Mr. Juſtice Downes. What we mean to ſay is, that the evidence now offered is antecedent to the act of parliament. There is evidence that it was poſſible for him to ſurrender before the arreſt; but he was arreſted and kept from that time to this in cuſtody; and he alledges that thereby it became impoſſible for him to ſurrender.

Mr. Ponſonby. Are you going, Mr. Attorney, to tender any evidence?

Solicitor General. I cannot tell, until the Court has decided that we ought.

Lord Kilwarden. Until you offer evidence we will give you no opinion.

Solicitor General. It may become a queſtion for the jury to conſider, if he was prevented from ſurrendering by the arreſt; or whether it was not by having himſelf claimed as a French citizen; and his having been in Ireland under a French commiſſion.

Mr. Ponſonby. At what time?

Solicitor General. Certainly before the paſſing the act.

Lord Kilwarden. What evidence do you offer?

Solicitor General. His acting as a French officer, certainly before the paſſing of the act, is evidence to go to the jury, coupled with what they have heard of his being claimed by the French miniſter, to rebut the allegation that the arreſt was the ſole cauſe of his not ſurrendering: I think there is evidence to ground that fact.

Prime Serjeant. I hope it is not out of rule to offer a few obſervations to the jury?

Mr. Ponſonby. I hope it is not underſtood that the priſoner's counſel is not to reply.

Prime Serjeant. The counſel for the priſoners have the reply; it was ſo ruled in *Roger Johnſon's* caſe.—Gentlemen of the jury, I take the iſſue in this caſe to be, whether the priſoner was prevented by the arreſt from ſurrendering himſelf: the iſſue being thus, in my apprehenſion, the evidence to ſubſtantiate the fact is defective. As to the point, the impoſſibility being in iſſue, now I take it to be decided by authorities that will not be queſtioned. It appears from the determination of the caſe of *Roger Johnſon*, that there muſt be a ſurrender: the ſame alſo appears from the deciſion in *Murray's* caſe: I therefore take the evidence in the preſent caſe to be defective: you will hold in your mind, that the impoſſibility of ſurrendering is the point in iſſue. There is given no evidence of a ſurrender, or offer to ſurrender, to *Sir James Crawford*, or any other perſon whatſoever; and therefore the priſoner has not maintained by evidence the iſſue he has joined in: but on the contrary, there is poſitive negative proof; for it appears, that ſo far from offering to ſurrender himſelf, *Sir James Crawford* ſwore that he believed the priſoner had claimed to be in the ſervice of a nation at war with this country, and therefore the evidence is defective as to the point. Theſe are all the obſervations I intend to make.

Here the caſe cloſed on both ſides.

Mr.

Mr. Ponſonby—ſaid, he agreed with *Mr. Attorney General*, when he ſaid, that the priſoner at the bar was a fortunate man to have his caſe ſubmitted to the deciſion of the judges who ſat on the bench; and to the jury, who ſtood in the box: he admitted the eulogium pronounced by the *Attorney General* on the criminal law of Ireland, in its fulleſt extent: he looked upon the criminal law of the country to be the moſt wiſe and humane of any code of criminal law that had ever come within his very limited knowledge; and he did extremely regret, that the wiſe and ſalutary proviſions of that law ſhould have ever been ſuperſeded, or that the life of any of his Majeſty's ſubjects ſhould be ſubject to any tribunal but that which the criminal law of this country had eſtabliſhed.

The jury had heard many caſes cited on the part of the Crown: it could not be ſuppoſed that the jury were in a ſituation, from the nature and habits of their education, and their way of life, exactly to underſtand the point, upon which thoſe caſes had turned; but they were fortunate in this, that in matter of law they would, under the direction and explanation of a Court fully competent to inform them on ſuch matters, perfectly underſtand where thoſe cited caſes differed from that which it was their province to decide on.

He would, in the firſt inſtance, addreſs a few obſervations to the Court. As to the caſe of *Lord Duffus*, ſo much relied upon by the counſel for the Crown, it was ſhortly this: it was a caſe on which no point was determined; no trial had for life or death. It was a caſe on which no point was determined during the life-time of the attainted perſon: it was a caſe in which no point was examined into during the life of the attainted perſon: it was a caſe in which, whether the plea which was put in by the heir of attainted perſon, was true or falſe; whether it would be good or bad if pleaded by the attainted perſon, were matters of which he was ignorant, becauſe the attainted perſon had ſuffered the day marked out by the ſtatute to elapſe without having ſurrendered. The proviſions of the act attainting neceſſarily attached to him; and whether he had any defence which would have been good if it had been made by him, to prevent ſuch the attaching of the proviſion of the act of attainder, was not examinable by any tribunal on earth, after his death: it was not for counſel or for the Court to ſay at this day, if *Lord Duffus* had a good or a bad plea: it was not for them to ſay

whether it was unwiſe in *Lord Duffus* not to make uſe of it; or, if he had made uſe of it, to ſay whether he would have been found guilty or acquitted: but *Lord Duffus* did not put in a plea, and therefore the Court were bound to carry the penalties into effect againſt the heir; and therefore the caſe of *Lord Duffus* had no more to do with the caſe of *Mr. Tandy* than any other caſe, and it would have been juſt as pertinent to the point to have quoted the caſe of the Six Carpenters; or that other caſe reported by *Doctor Swift*, the caſe of *Stradley* verſus *Styles*, as to have quoted the caſe of *Lord Duffus*.

Unleſs the caſes quoted had actually come to trial before a Court and a jury, and agreed with the preſent in principle, and in every other circumſtance that could govern that principle, no other kind of cauſe was of any authority over the caſe depending before the jury: both the principle ſhould be the ſame, and the rule for application ſhould be the ſame, or elſe one adjudged caſe could never be authority in the deciſion of another.—As to the caſe of *Robert Johnſton*, that was the caſe of a man outlawed for high treaſon: he came in and deſired liberty to plead that he was out of the kingdom. The firſt point in controverſy was, whether his ſurrender ſhould be accepted; and the ſecond point was, whether his plea was good: the Court determined that his plea muſt be received; and the jury found that he was out of the kingdom: and if there be any thing of analogy, not to ſay of identity, between that caſe and the preſent, it was favourable to *Mr. Tandy*; becauſe if, in the firſt caſe, the Court determined that the ſurrender ſhould be received, ſo, ſurely, the Court ſeemed bound in the preſent caſe, if the priſoner was prevented by any act of power or oppreſſion from ſurrendering, under the proviſion of the act of parliament, to ſay that it amounted to an acquittal of the charge.

The ſtatute upon which the preſent debate was, after reciting the names of the different perſons on whom were to attach the penalties of high treaſon, went on to ſay, "That "unleſs they and each of them reſpectively ſhall ſurrender "to ſome one of the judges of his Majeſty's Court of "King's Bench, or to ſome juſtice of the peace within this "kingdom, before the firſt day of December, 1798, and "ſhall reſpectively abide ſuch charges as ſhall be made

"againſt

" againſt reſpectively, for and on account of the ſeveral " treaſons aforeſaid, with which they have been charged."

This act received the royal aſſent, and became binding on the ſubject on the 6th day of October, 1798; and from that time to the firſt day of December, in the ſame year, was the ſhort period allowed for the priſoners therein named, to ſurrender themſelves to juſtice: a period very ſhort indeed; becauſe, let the jury ſuppoſe that any one of the perſons named had a charge made on him, and thinking it imprudent for him to ſtand a trial, and feeling that the prejudice of the public ran againſt him, had gone to the continent of America, ſurely there would not be time for him to receive notice of the ſtatute, and time enough for him to ſurrender himſelf in Ireland, to be amenable to juſtice within the time limited. And, therefore, the minds of thoſe perſons who framed the act, ſeemed to have been too much tainted by the events that had recently paſſed, and too much impaſſioned for the purpoſes of ſober legiſlation: a law of this ſort ſhould be made with ſo much deliberation; with ſo much conſideration, that it ſhould not be ſubject to any reaſonable objection; and when a legiſlature ſhews more a deſire of avenging public juſtice, than giving time to the accuſed perſon to defend himſelf; it ſhews there is more of human paſſion than wiſdom in ſuch legiſlation.

Such were the proviſions of the act; and ſuch the length of time allowed to the proſecuted perſons: *fifty-ſix* days were allowed to the perſons ſo comprehended; and on the 24th day of November, 1798, it appeared from the evidence, that the priſoner was arreſted by deſire of the miniſter plenipotentiary of the King of Great-Britain, expreſſed to the Government of *Hamburgh*, a neutral ſtate, and within whoſe territories he was found. It had appeared to the Court and to the jury, from the evidence of *Sir James Crawford*, that from the moment of that arreſt, until the preſent day, that arreſt had been continued; but it was contended by the counſel for the crown, that, becauſe there were many days previous to the firſt day of December, if the priſoner had expreſſed a deſire to *Sir James Crawford*, he might have ſent him to Ireland—that the jury ſhould conſider the arreſt and continual confinement as no bar to the actual ſurrender of the priſoner in the kingdom of Ireland. As to the

firſt

firſt part of the argument, that the jury ſhould not conſider the arreſt as a bar to the ſurrender, that could have nothing to do with the iſſue. for the Court had been pleaſed to ſay, that ſuppoſing the priſoner to have been guilty of the intention not to ſurrender before the day on which he was arreſted, yet it was his right, if he choſe to change that intention, to ſurrender himſelf. And if it was his right to ſurrender himſelf at any period, to the laſt moment of the day on which the non-compliance was to carry the act into effect; ſuch a ſurrender the Court would alſo tell the jury, would have been as effectual as if it had been made on the 6th of October. But the counſel for the crown contended, that though he was arreſted, that it did not make it impoſſible for him to ſurrender himſelf; becauſe *Sir James Crawford* ſaid, that if application had been made to him, he believed he would ſend him—where? To England firſt. The attention of the jury had alſo been called, to what was conſidered as a moſt material point; namely, that the priſoner had been claimed as a French officer; but they would pleaſe to obſerve, that *Sir James Crawford* ſaid nothing on that head of his own knowledge—he had never ſeen the priſoner—had never converſed with the priſoner—he knew nothing of his intentions or of his ſituation, except ſo far as he had been informed by common fame. This kind of evidence could not be received againſt the priſoner: the Court would tell the jury that no ſuch evidence of hearſay and belief, on the part of the Crown, could be admitted on a direct examination to criminate the priſoner; but becauſe *Sir James Crawford* was produced by the priſoner, the Crown was at liberty to croſs-examine: that kind of examination was legal; but how ſtrong or weak was matter of inference for the jury. What did *Sir James Crawford* ſay?—He ſaid, he did not know if he could ſend him; if he did, it would be to England: but he did not know if he had been applied to, if he could have ſent him to England the next day: he did not know either that he would or that he could.—He did not know if the Senate of Hamburgh would have conſented to it; for they were afraid of embroiling themſelves with the French miniſter—and yet the jury were called upon to find a verdict bringing the priſoner within the penalty of an act of parliament, by which he was to forfeit his life without any examination of his

guilt

guilt or innocence, becauſe the counſel for the crown ſay he was not amenable to juſtice, and did not intend to be ſo—and becauſe *Sir James Crawford* ſaid, that he did not know if he would or could have ſent him over to Ireland, or if the Senate of Hamburgh would have conſented.

The jury, *Mr. Ponſonby* requeſted would be particular to obſerve, that if the priſoner had been ſent to London, it would have been of little avail; for the act of parliament did not require him to ſurrender himſelf to any juſtice of Great-Britain: but the act required him to ſurrender to ſome one of the judges of his Majeſty's court of King's-bench, or to ſome juſtice of the peace within this realm of Ireland: and, therefore, the jury were to preſume, that if *Sir James Crawford* had ſent him at all, if he had authority to ſend him, he would have ſent him round through England, and the King's miniſter in England was the perſon into whoſe hands he would have been delivered, who probably would not have wanted for an excuſe to detain him: and all this the jury were called upon by the counſel for the crown to take as proved—for what purpoſe? In order to bring the priſoner within the penalty of a law, by which he forfeited his life, without either his guilt or innocence being examined into, for or againſt him.

The wiſdom of the counſel for the crown directs their conduct; and, therefore, they thought it wiſe to talk about a French commiſſion—and claiming protection—and landing in Ireland, and leaving the coaſt: And for what purpoſe was this done? Was it to ſhew it was poſſible for him to ſurrender himſelf?—Was it to ſhew, that by being arreſted he was prevented from ſurrendering himſelf?—Was it to ſhew, whether he did intend to ſurrender or not?—No: but it was for the purpoſe of impreſſing on the minds of the jury, that the priſoner had been guilty of treaſon, and extracting from them a conviction without proof; a ſentence of condemnation on this ſummary act of parliament.

The jury (he ſaid) were ſworn to decide the nature of the iſſue, and they were ſworn to decide nothing elſe: and whether the priſoner had or had not a French commiſſion; or did not intend to ſurrender; or whether he had committed any act of treaſon, was as foreign from their conſideration as the caſe of *Lord Duffus*, ſo much relied upon by the

counſel

counſel for the crown; or of the caſe of any other man that was born one hundred years ago; or remained to be born one hundred years hence.

In one reſpect the priſoner had a great advantage—the evidence of *Sir James Crawford*, who could not by any proceſs have been compelled to come to Ireland; but the honorable ſentiments which always governed his feelings had induced him to do that which no power on behalf of the priſoner could have compelled him to do: and, therefore, it was fortunate, that as the priſoner had been arreſted, it was under the authority of a gentleman who had acted the honorable part *Sir James Crawford* had acted. A perſon had been ſent (*Mr. Smith*) to *Hamburgh*, with unlimited offers in point of expence, to thoſe perſons whoſe teſtimony could have been of advantage to the priſoner, to induce them to come to Ireland to give evidence, but their attendance could not be procured. But that which might have been withheld by the abſence of thoſe witneſſes, had almoſt entirely appeared from the evidence of *Sir James Crawford*. If they had appeared, it would have been proved beyond doubt, that from the moment of the priſoner's arreſt to his tranſmiſſion to England, it was impoſſible for him to make any application to any perſon but the ſavage brutes that were his keepers. What *Mr. Curran* ſtated would have been proved; that a dog was better treated—fed more cleanly—uſed more kindly; as if it was imagined he had more human reaſon and nature about him than an unfortunate and perſecuted man; if it had not been for the conduct of *Sir James Crawford* it would have been impoſſible for the priſoner to have avoided incurring the penalty of the act of parliament.

What was the ſituation of the priſoner? He was arreſted on the 24th day of November, 1798, and detained ſeven months in cuſtody there—confined in a gaol, and under force—*Sir James Crawford* never ſaw him, until the day he was removed—yet it is attempted to be given in evidence, that ſome perſon calling himſelf a French ambaſſador; or calling himſelf the friend of the priſoner, did ſay certain things to *Sir James Crawford*, which ought to be attached to the priſoner: Yet was there any proof laid before the jury that any one of thoſe declarations or deſires were by the authority of the priſoner, or came from him? And yet the

jury

jury was called upon to bring a man within the penalties of an act of parliament, that took away his life without a trial, and without any evidence that any of those declarations sprung from him. But, in truth, the prisoner ought to be considered as having surrendered himself the day he was arrested: he was amenable to the law, if the English Government could or would have sent him to Ireland: he was amenable to law if he had been sent; but, situated as he was, it was impossible for him to send himself. If it was not in the power of *Sir James Crawford*, who had him arrested, to send him to Ireland, how was it possible for the prisoner, that was in close confinement, to come himself? It would require a process more than human, to do that; and, therefore, the jury could not say that he was at liberty to surrender himself:—they could not say that his arrest and continual imprisonment did not make such a surrender impossible.

Mr. Ponsonby—concluded, by observing the case appeared self-evident; but where the life of a fellow creature is at stake, and where a man is entrusted with the defence of that life, no exertion ought to be forborne. And, therefore, though I felt the case to be plainly in favour of my client; yet, I thought it my duty to say thus much to you. It is fortunate for him, that he is tried by the judges now on the bench, and by the jury now in the box: and having done my duty in submitting such observations as occurred to me, I commit him, Gentlemen, to your care. The Court must feel the evidence imperative on them, both by weight and force, before they will direct a jury to bring the man within the law: and the jury will feel the evidence coercive indeed, before by such a verdict they will affect the prisoner's life.

Mr. Mac Nally (same side) said, that though counsel for the prisoner were entitled to the indulgence of the Court, yet his feelings, and the inclination of his mind, if he suffered them to predominate, would induce him to remain silent on the present occasion; but what had fallen from *Mr. Ponsonby* rouzed him to an exercise of his professional duty, which he now considered as imperative; calling upon him to give to his client the aid of those weak exertions which he possessed. Almost every thing that wisdom could suggest, on the subject before the Court, had been forcibly and clearly delivered, by those friends with whom he acted; but there was still an

object or two, which he conſidered untouched, and which he truſted would have ſome degree of weight and force, not only with the jury, but with the Court.

He would firſt obſerve, that the words of the act of parliament, upon which the counſel for the crown had attempted to attaint the priſoner at the bar of high treaſon, were plain and clear. The words of the act were, that "unleſs the perſons therein named, among whom were the priſoner, *James Napper Tandy*, ſurrendered to ſome one of the judges of his Majeſty's court of King's-bench, or to ſome juſtice of the peace within the kingdom of Ireland, on or before the firſt day of December, 1798; and ſhould reſpectively abide ſuch charges as ſhould be made againſt them, for, and on account of, the treaſons charged upon them—they ſhould ſtand attainted of high-treaſon."—Theſe were, ſubſtantially, the words of the penal clauſe in the act; and theſe words perſpicuouſly pointed out the intention and meaning of the legiſlature when enacting it. What was that intention? It was to call back to this country certain perſons, in the act named, and, amongſt others, the priſoner at the bar, *Mr. Tandy*, whom the legiſlature preſumed had fled from juſtice, to render themſelves amenable to law. The priſoner was charged with having fled; and if flight was not an offence in itſelf, it was certainly, in contemplation of law, evidence of an offence.—It was evidence of an offence, before the enacting of the ſtatute—it was a contempt of the ſtatute afterwards: but whether it was an offence, or a contempt, the intent of the legiſlature was ſatisfied; for it required neither argument nor fact to prove, that the priſoner was, at the preſent moment, amenable to juſtice—and there he ſtands (pointing to Mr. Tandy), ready to abide ſuch charges as the law officers of the crown ſhall make againſt him.—Then how were the jury to act? The circumſtance of *Mr. Tandy*'s being now a priſoner at the bar, muſt go with this effect to their minds, that unleſs the cleareſt proof, the nature of the caſe would admit, be laid before them, to convince them, beyond all doubt, that it was poſſible for him to ſurrender, as directed by the act; and that he was not prevented from ſo doing, by any extraordinary interpoſition of power, force, or authority, they would bring in their verdict in favour of the priſoner—grounded on the phyſical impoſſibility

ſibility of his being able to ſurrender himſelf, agreeable to the intent and meaning of the act of parliament.

Mr. Mac Nally—then urged to the conſideration of the jury, that there was no proof before them that the priſoner had any knowledge of the bill of attainder having paſt; or that he was ever called upon to ſurrender: and he argued that wherever a ſtatute laid a penal injunction upon a man, to perform a condition, the common law gave him three excuſes for the non-performance. Firſt, the act of God was an excuſe, becauſe no human wiſdom could prevent its effect; ſecondly, the act of the law was an excuſe, becauſe the law can in no caſe be ſuppoſed to work an injury; and thirdly, becauſe it is a legal maxim, that the King can do no wrong. If the King can do no wrong himſelf, neither can he do ſo through the medium of his repreſentative; and the jury had heard in evidence, from *Sir James Crawford*, his Majeſty's repreſentative at Hamburgh, that the gentleman at the bar had been arreſted by his orders, founded on the royal authority: they had alſo heard deſcribed, and uncontradicted, his miſerable ſituation in the gaol of Hamburgh, after that arreſt, and muſt be convinced from thoſe circumſtances of cruelty and coercion, that it was not in his power to ſurrender, and become amenable to the injunction of the ſtatute of attainder.

The queſtion to be decided upon by the jury, had been plainly laid down by *Mr. Curran*; it was this, whether the defendant was ſo arreſted, that it became impoſſible for him to ſurrender? This queſtion contained the very iſſue to be tried and determined on by the jury; and the affirmative of it was ſubſtantiated, by the only witneſs examined to the fact, that was *Sir James Crawford*, his Majeſty's repreſentative.

It would be unneceſſary for him to obſerve on the whole of *Sir James Crawford*'s teſtimony; but he would make a few obſervations on thoſe points which he conſidered material. *Sir James* had ſworn to facts within his *knowledge*, and on thoſe facts there could be no doubt; *Sir James* had ſworn to his *belief*, founded on hearſay, and from that part of his evidence no concluſion could be drawn againſt the defendant. He would repeat this obſervation, for it was material that the jury ſhould remember, that every point of the evidence ſworn to, as within *Sir James Crawford*'s own poſitive

knowledge, was in favour of the priſoner at the bar; whereas every point that might be preſumed to make againſt him, was only founded on belief reſulting from hearſay, and could not make againſt the priſoner. The firſt ſpecies of *Sir James Crawford*'s evidence, went to prove the impoſſibility of the priſoner's ſurrendering, as required by the act of attainder; the ſecond ſpecies only went to ſhew, that the witneſs did not believe that the priſoner had an intent to ſurrender, and become amenable to juſtice—a point irrelevant to the iſſue; for the intent made no part of the iſſue; nor was it, as the Court had already declared, a point for the conſideration of the jury; they were concluded to try a ſimple fact, not an intention.

He aſked the jury, would they take the witneſſes poſitive knowledge of material facts, as the criterion upon which they would decide, or would they ground their verdict upon the belief of the ſame witneſs, reſulting merely from what he had caſually heard from ſome perſon, but not from the priſoner; and which amounted at leaſt to no more than conjecture? He entreated them to recollect, and to take into their moſt ſerious conſideration this circumſtance, that which ever way they gave credence to the evidence, it would be their duty, on the iſſue they were to try, to find for the priſoner.—"It is material, ſaid he, Gentlemen, that you ſhould remember this moſt ſerious circumſtance in favour of my client—that the direct evidence of *Sir James Crawford*, goes immediately, and directly, and poſitively to the iſſue and to acquittal; but, that the hearſay evidence goes to no part of the iſſue knit between the parties—it goes merely to ſhew a probable intent; and the Court will tell you, that Mr. Tandy's intent, at the time of his arreſt in Hamburgh, isno object for your conſideration."

Another object, he ſaid, occurred to his mind, and ſtruck him with peculiar force; and he truſted, when attended to by the jury, would equally affect them. It was this, the only material witneſs produced on the trial, was *Sir James Crawford*, and he was brought forward by the priſoner. Mr. Attorney General had not called one witneſs from the town of Hamburgh; ſo that every circumſtance in the teſtimony of *Sir James*, being uncontradicted, muſt be taken as concluſive. Not a ſingle witneſs from Hamburgh, to impeach

the

the priſoner's plea; not a ſingle witneſs from Hamburgh, to ſupport the Attorney-General's replication. How was this to be accounted for? Would the jury believe, that the omnipotent miniſter of the crown of England, he who had ordered the impriſonment of the defendant in Hamburgh, had not power, nor influence, nor other means, to produce witneſſes from Hamburgh againſt the priſoner, if ſuch witneſſes were to be had? But the thing was impoſſible—no man could be found, even there, daring or baſe enough to come forward and contradict that honorable and fair teſtimony, which *Sir James Crawford* had given, in favour of Mr. Tandy. Then what was the fair inference to be drawn from this total deficiency of evidence on the part of *Mr. Attorney-General?* It was a legal inference; and he would tell the jury the rule of law upon the point. It was a rule of law, he ſaid, that where a party, as in the preſent caſe, had time and means to produce a witneſs, and did not produce him, for the Court and jury to preſume, that ſuch witneſs was purpoſely withheld; and that if he had been produced, his teſtimony would have made againſt whatever point of evidence the parties withholding him deſired to eſtabliſh.—If there was means to producing witneſſes from Hamburgh, why are they withheld? The anſwer is, becauſe if in court they would not contradict, but would corroborate and eſtabliſh the evidence of *Sir James Crawford*, in favour of the defendant. The perſons who had the cuſtody of Mr. Tandy, his humane gaolers, might have been in court; but they were not preſent. Some of the members of the independent Senate of Hamburgh might have been imported, to give evidence for the Crown; but not one of thoſe reſpectable characters was here. The officers of juſtice might have come forward, but they were kept back.—If it be aſked, why did not Mr. Tandy bring them forward? Mr. Smith's evidence gives an explicit and ſatisfactory anſwer. That gentleman has told the jury, on his oath, that he offered thoſe Hamburgh ſenators, and gaolers, and officers of juſtice, money, and they refuſed it.—The Senators of Hamburgh refuſed money! Will any man who ever heard of their character believe, that they refuſed money, unleſs there was ſome ſtrong ſecret reaſon, operating on their minds, which may be eaſily gueſſed at, but can not be poſitively

tively ſtated or proved? An unlimited demand for their expences to Ireland, was offered by Mr. Smith, on the part of Mr. Tandy; but they could not leave Hamburgh; it was impoſſible for them to come.—Yes, it was as impoſſible for thoſe worthies to come from Hamburgh into Ireland, to give evidence, as it was for Mr. Tandy to come from thence to ſurrender. Both parties were held in Hamburgh by force—neither party had a power of coming into this country.

Mr. Attorney-General had attempted to ſap the plea of the defendant, by caſes of law—but here law was out of the queſtion; for the replication to the plea had brought on a ſimple iſſue of fact before the jury. The firſt caſe quoted by Mr. Attorney, was from the reign of Henry IV.: the law in that caſe, of Henry IV. was as dead as Harry the eighth; peace be to its manes! Mr. Attorney had given it a kind of reſurrection; but he truſted it would now return to its grave, to reſt in peace, and never again haunt a court of juſtice.

As to *Lord Duffus's* caſe, on which the Attorney General relied as an implicit authority, it called for obſervation. On a ſuperficial reading of that caſe, it certainly bore analogy to that of the priſoner's; but on a minute examination, no two caſes were ever more diſſimilar: they both were on bills of attainder, and that was the only feature of reſemblance between them, for they differed not only in the mode of proceeding, but compleatly in principle.

The diſtinctions between the caſes were theſe: *Lord Duffus* was taken and committed to the tower, but pardoned by the King. *Mr. Tandy* was taken by order of the King, and kept a cloſe priſoner in Hamburgh till the time for his ſurrender had expired.

Lord Duffus conſidering the pardon of the King a bar to the attaint, petitioned his Majeſty that he might be reſtored to his peerage. The King referred the petition to the houſe of lords—the lords rejected the petition—Why? Becauſe the verdict of a jury only could ſay, that he was amenable to juſtice within the intent of the act of attainder.

The verdict of a jury in favour of the defendant, is the only bar to an attaint created by act of parliament: the King's pardon is no bar. Then what is the queſtion here?

Not

Not whether *Mr. Tandy* is guilty or innocent of the charge of treaſon exhibited againſt him by the act of attainder; but whether he ought to be executed as a traitor, without being put upon trial, on a charge of treaſon. When the jury have acquitted *Mr. Tandy*, and on the preſent iſſue I anticipate that their verdict muſt be an acquittal, then there would be another queſtion to try—there would be another queſtion to try after the jury had acquitted him on the preſent charge: the preſent charge was, that the priſoner had incurred the penalty of death by default; but their verdict of acquittal would reſtore to the priſoner the great privilege and bleſſing of the common law, trial by jury, on an indictment for whatever charge was againſt him.

Lord Duffus obtained the King's pardon—*Mr. Tandy* had not; but if *Lord Duffus* had been brought to trial before a jury on the queſtion of ſurrender, it was more than probable his Lordſhip would have been acquitted, as he truſted his client would this day be. *Lord Duffus* was pardoned by the King; but the King's pardon on a bill of attainder by parliament, could not reſtore *Lord Duffus* to his privilege, to his honours, or remove the corruption of blood created by ſtatute; nothing but the verdict of a jury could purge thoſe diſabilities. The proceedings againſt *Lord Duffus* alſo varied in other reſpects from thoſe againſt *Mr. Tandy*: *Lord Duffus* was a peer of parliament, and the proceedings in his caſe were before the Houſe of Lords, not before the Court of King's Bench;—the queſtion there was not, as it is here, whether the act of the King had rendered it impoſſible for *Lord Duffus* to ſurrender; but it was this, whether *Lord Duffus* having been pardoned by the King (the acceptance of which pardon, was an admiſſion of guilt), was thereby reſtored to his blood and to his privileges of peer?—and the lords held, that the King's pardon did not reſtore him.

Here he apologized for detaining the jury, and ſaid, he would make but one obſervation more; an obſervation in which, probably, the jury had themſelves anticipated him, and which, if they thought with him, muſt acquit the priſoner on the preſent iſſue—it was this, that the queſtion now to be decided by the jury, was not (as had been put by the Attorney General), whether, if the priſoner had been at liberty from the 24th day of November, 1798 (when he was arreſted),

arreſted), until the firſt day of December following (when the time for ſurrendering expired), he *would* have come into this country in order to become amenable to juſtice? No, the queſtion was not whether he *would*, but whether he *could*, within that time, have ſurrendered? The evidence anſwers the queſtion thus—that he could not have ſurrendered. What are the facts? The priſoner was arreſted at Hamburgh; he he was there thrown into a dungeon—he was guarded—he was chained:—Could he, ſo circumſtanced, have ſurrendered himſelf in Ireland within the time limited by the ſtatute? No, it was phyſically impoſſible; and this was the queſtion on which the jury had to decide. Can a man be in two places at once? A very ſapient and learned member of the Iriſh parliament, and who, very likely, may ſhortly be tranſlated to the Britiſh ſenate, decided this queſtion—he declared, "a man could not be in two places at once, unleſs he was a bird."

Mr. Mac Nally—concluded, by congratulating the public on the Attorney General's eulogium upon the conſtitutional office and ſacred functions of juries. Government, however, had not, as yet, reſtored them univerſally; for though he had now the gratification of addreſſing a reſpectable jury in Dublin, he ſhould, as ſoon as the trial concluded, ſet off for Carlow, to attend, as counſel, before a military tribunal, for perſons charged with offences that were not within the cognizance of martial law.

Mr. Ridgeway. My Lords, and Gentlemen of the Jury, I am of counſel on the ſame ſide with the gentleman who ſpoke laſt; and I will ſubmit a few obſervations applicable to law, on this caſe, without diſturbing thoſe impreſſions which my learned colleagues have made——

Lord Kilwarden. The Court all think the caſe clearly with your client.

Mr. Ridgeway. Then, my Lord, I will not trouble the court or the jury.

Here the caſe cloſed on both ſides.

LORD KILWARDEN.

GENTLEMEN OF THE JURY,

You have a plain and ſimple iſſue, on a queſtion of fact, to decide; and on as ſimple and plain evidence, as ever was laid before a Court and jury.—The queſtion you have to try is, whether *James Napper Tandy*, the priſoner at the bar, was arreſted on the 24th day of November, 1798, by authority derived from the King; and that by reaſon of that arreſt and continual detainer under that arreſt, from the day of the arreſt to the firſt day of December in the ſame year, 1798, it became impoſſible for the ſaid *James Napper Tandy* to ſurrender himſelf, on or before the firſt day of December, 1798.

Before I ſtate the evidence, I will trouble you by ſtating the occaſion of the preſent enquiry. An act of parliament paſſed in this country on the fifth day of October, 1798, entitled, "An act to compel certain perſons who have been engaged in the late rebellion, which hath broken out in this kingdom, to ſurrender themſelves and abide their trials, reſpectively, within a limited time, on pain of being attainted of high treaſon." And then the act goes on, and recites the names of certain perſons charged with being concerned in acts of treaſon, and among the reſt, the priſoner; and that he had fled: and then the act proceeds to adopt ſuch meaſures as may bring them in and render them to juſtice; then it goes on and ſays, that each of them "ſhall ſtand attainted of high treaſon, and ſhall be liable to all the pain sand penalties by law annexed to the crime of high treaſon, unleſs they and each of them ſhall ſeverally and reſpectively ſurrender themſelves to ſome one of the judges of his Majeſty's Court of King's Bench, or to ſome juſtice of the peace within this kingdom, on, or before the firſt day of December 1798, and ſhall reſpectively abide ſuch charges as ſhall be made againſt them reſpectively, for and on account of the ſeveral treaſons aforeſaid, with which they have been charged."

The parties mentioned in this act, had until the laſt moment of the day of the firſt of December, 1798, to ſurrender themſelves: and, gentlemen, you will obſerve, that the object of this act was not to attaint or puniſh any man; but

it was to compel every man, mentioned in it, to do that which every ſubject of the realm was bound to do; namely, to ſurrender himſelf to juſtice: and the act does expreſsly ſay, that he muſt ſurrender himſelf, and take his trial for any charges that ſhall be brought againſt him. The end and purport of the act was not to inflict puniſhment on the party, or to condemn him to death unheard; but it was to compel him to do that which he ought to do, namely, to ſurrender himſelf; and in caſe he did not ſurrender himſelf, the act then went further, and enacted, that the fact with which he was charged, ſhould be taken as confeſſed, and that he had acknowledged the crime. I have ſtated ſo much to you, to remove from your mind what cannot indeed enter into it—that you have no more to do with the criminality of *Mr. Tandy*, than you have with the criminality of any other perſon alive; and it is your duty to ſuffer no ſuch idea to enter into your minds. It is neceſſary for me to go further: I will ſtate this to you—that by finding a verdict in favour of the priſoner at the bar, it will produce no other effect, than giving the Crown an opportunity of indicting him for ſuch charges as they may have againſt him: and in my apprehenſion, the intention or criminality of the priſoner is out of the queſtion. I wiſh you to bear in your mind what the iſſue to be tried is; it is what I have ſtated—whether *Mr. Tandy* was arreſted on the twenty-fourth day of November, 1798, and kept in cloſe cuſtody; and *quoad* whether it was thereby rendered impoſſible for him to ſurrender himſelf. As to his will or intention, it is not given to you in evidence, nor are you bound to enquire into it; and if you ſuffer that to enter into your conſideration, you will find a verdict (if you find againſt the priſoner) on a fact that had no right to go to you in evidence. It is not what his intention was, or might have been, on the twenty-third of November, 1798, to go to Paris, and on the twenty-fourth to come to Ireland: that is beyond your enquiry; and if you enter into a conſideration on that ſubject, you do that which you were not ſworn to try. But you are ſworn to try if he was, from that day until the time limited had elapſed, continually confined; and if it was thereby rendered impoſſible for him to ſurrender himſelf "to one of the judges of the court of King's-bench, or to ſome juſtice of the peace within this kingdom."

It remains now but to conſider the evidence. There was but one witneſs was produced, and that was the Britiſh miniſter reſident at *Hamburgh* at the time of *Mr. Tandy*'s arreſt, And what does Sir James Crawford ſay? From his evidence you will enquire, if it was poſſible for *Mr. Tandy* to come over to Ireland to ſurrender himſelf. *Sir James Crawford* informed you, that he received inſtruction from *Lord Grenville*, his Majeſty's ſecretary of ſtate, to have *Mr. Tandy* arreſted: that he accordingly was arreſted, and confined in the gaol of *Hamburgh*.—You will be particularly attentive to *Sir James Crawford*'s expreſſions. He ſaid the priſoner was under cloſe confinement, and had been continually watched by foreign officers, from the time of his arreſt, until he was tranſmitted to England.—That is the direct and poſitive evidence of *Sir James Crawford*. *Mr. Tandy* was arreſted by his order—detained by his order—under the authority of a foreign ſtate—by officers of a foreign ſtate. The poſſibility of *Sir James* having diſcharged him from the arreſt does not appear, nor is there any evidence to ſhew that poſſibility. Some queſtions were aſked *Sir James*, as to what he heard and believed.—His anſwers to thoſe queſtions, in the opinion of the Court, are not evidence to bear on the preſent caſe. *Sir James Crawford* ſaid, that he did hear a requiſition had been made, and he believed the priſoner had been claimed as a French officer; but he heard it from ſome perſon, not from the priſoner—he never had any converſation with him—he never ſaw him until the day he was tranſmitted—That is not evidence to affect *Mr. Tandy*. You are told that this gentleman might have come over into Ireland, becauſe he might have made application to *Sir James Crawford*. In my mind that is a very groſs ſuppoſition: but if he had an opportunity of making that application, *Sir James Crawford* did not know if the Senate of *Hamburgh* would have conſented.—*Sir James* went farther—he never had any converſation with the priſoner—he did not know if the priſoner was acquainted with the circumſtance of having been arreſted by his orders as the Britiſh miniſter. The fact does not appear, that the priſoner knew by what authority he was arreſted; and without that knowledge how could he know where to make an application? How is it poſſible to conceive, from the evidence given, that he had an opportunity to make any application? For my part, I cannot conceive

ceive it. I have the direction of my brethren on the bench, to ſay for them what I have already ſaid for myſelf; that it is a caſe particularly clear, and on which there can be no doubt; that there was an impoſſibility from the time of the priſoner's arreſt, on the *twenty-fourth* day of November, 1798, until the laſt moment of the firſt day of December following, to ſurrender himſelf according to the requiſitions of the ſtatute.

The jury retired for a few minutes, and then returned their Verdict—

"*WE FIND FOR THE PRISONER.*"

Mr. Attorney-General—then ſtated, that as the ſame evidence was applicable to the priſoner, *Harvey Morris*, he would withdraw the *replication*, and confeſs the *plea*; which being done, he prayed that the priſoners might be remanded for the preſent.

The priſoners were accordingly remanded.

COUNSEL FOR THE CROWN.

Meſſrs. Attorney-General, Saurin,
Prime Serjeant, S. O'Grady, and
Solicitor General, Mayne.
Agent.—Thomas Kemmis, Eſq; Crown ſolicitor.

COUNSEL FOR THE PRISONERS.

Meſſrs. J. P. Curran, George Ponſonby,
Mac Nally, Ridgeway, and
Buſhe.
Agents.—Meſſrs. Alexander Cooke, and Hal. Alſop, Eſq;

The priſoners, notwithſtanding their long confinement, looked remarkably well, appeared in good health and high ſpirits.—*Mr. Tandy* was attended in court by his ſon, *James Tandy*, Eſq; alſo *John Tandy*, *Thomas Tandy*, and *John Tandy*, jun. Eſq; of the Co. Meath, and ſeveral other near relations.

4.Q.L.V.D.
6/2/11.